IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

Nos.
20872, 20885, 20890, 20891,
20892, 20967, 20989, 21028

CALLERY PROPERTIES, INC.; THE SUPERIOR OIL COMPANY; CAROLINE HUNT SANDS AND LOYD B. SANDS; PLACID OIL COMPANY; MARGARET HUNT HILL, TRUSTEE FOR HASSIE HUNT TRUST; J. RAY MCDERMOTT & CO., INC.; OCEAN DRILLING & EXPLORATION COMPANY, INC.; J. R. FRANKEL, ET AL., *Petitioners,*

v.

FEDERAL POWER COMMISSION, *Respondent.*

On Petitions to Review and Set Aside Orders of the Federal Power Commission

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JOINT APPENDIX

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

Nos.
20872, 20885, 20890, 20891,
20892, 20967, 20989, 21028

CALLERY PROPERTIES, INC.; THE SUPERIOR OIL COMPANY; CAROLINE HUNT SANDS AND LOYD B. SANDS; PLACID OIL COMPANY; MARGARET HUNT HILL, TRUSTEE FOR HASSIE HUNT TRUST; J. RAY MCDERMOTT & CO., INC.; OCEAN DRILLING & EXPLORATION COMPANY, INC.; J. R. FRANKEL, ET AL., *Petitioners,*

v.

FEDERAL POWER COMMISSION, *Respondent.*

On Petitions to Review and Set Aside Orders of the Federal Power Commission

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JOINT APPENDIX

A3430

Contract No. 2479

STATE OF LOUISIANA
PARISH OF LAFOURCHE

This agreement entered into the 12th day of August, 1957, between J. R. Frankel and R. R. Frankel, as "Seller" and Transcontinental Gas Pipe Line Corporation, as "Buyer".

WITNESSETH:

THAT WHEREAS, under authority of Federal Power Commission Certificates of Public Convenience and Necessity, Buyer owns and operates a natural gas transmission pipe line system and now proposes, upon receipt of acceptable certification from said Federal Power Commission, to construct and operate additional facilities to such pipe line system (hereinafter called "new facilities") for the purpose of purchasing and receiving gas produced from fields in South Louisiana; and

WHEREAS, Seller has natural gas producing acreage in the North Thibodeaux Field, Lafourche Parish, Louisiana, described in Exhibit "A" and outlined on plat marked Exhibit "A-1", both hereto attached and made a part hereof for all intents and purposes, and desires to produce therefrom and sell to Buyer natural gas in the quantities and upon the terms and conditions hereinafter set forth:

A3431

NOW, THEREFORE, in consideration of the premises and the mutual covenants herein contained, Seller and Buyer agree:

• • • • • • • • • •

A3445

ARTICLE X

PRICE

1. Subject to the other provisions of this agreement, for quantities of gas delivered during the periods below established, or if available and not taken as herein required, Buyer shall pay Seller the following prices per Mcf.

(a) From date of first delivery to July 1, 1962, twenty-one and one-half cents (21.5¢);

(b) From July 1, 1962 to July 1, 1966, twenty-three and one-half cents (23.5¢);

(c) From July 1, 1966 to July 1, 1970, twenty-five and one-half cents (25.5¢);

(d) From July 1, 1970 to July 1, 1974, twenty-seven and one-half cents (27.5¢);

(e) From July 1, 1974 and thereafter during the term hereof, twenty-nine and one-half cents (29.5¢);

all on the measurement basis set forth in Article II of Exhibit "B" hereof.

A3446

2. Buyer shall reimburse Seller for its payment of the gas gathering tax, and severance tax, at the rate presently established by the laws of the State of Louisiana or any tax or taxes assessed in lieu thereof, provided the total one hundred per cent (100%) reimbursement for such gas gathering tax, severance tax and any tax or taxes assessed in lieu thereof shall not exceed the total of the rates presently established by the laws of the State of Louisiana, and agrees that if at any time during the term of this

agreement any new or additional occupation, production, severance, gathering, compression, or sales tax or taxes of similar nature or equivalent in effect, in excess of the rate prevailing as of the date hereof, shall be validly imposed by any lawful authority on the gas delivered to Buyer pursuant to this agreement, or on the production, severance, gathering, or sale thereof, so that Seller shall be required to pay such increase either directly or through reimbursing others, Buyer shall, subject to the conditions hereinafter set forth, reimburse Seller in the amount of three-fourths (¾ths) of any such increase in taxes or three-fourths (¾ths) of such new taxes, provided, however, that in computing such increases in taxes there shall not be included increases in income taxes, capital stock taxes, franchise taxes, general property taxes, or such other taxes of like nature as may hereafter be imposed. In case any such reimbursement for taxes is to be made, Seller shall notify Buyer immediately

setting forth the basis of such increase in taxes to be paid by Seller on gas delivered, and Buyer shall reimburse Seller monthly for three-fourths (¾ths) of the increase in the amount of taxes paid or to be paid on gas delivered by Seller during the preceding calendar month.

• • • • • • • • • • •

A7258

Received August 30, 1957

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL POWER COMMISSION

Docket No. G13197

In the Matter of

J. R. FRANKEL AND R. R. FRANKEL

Application for Certificate of Public Convenience and Necessity

Comes now J. R. Frankel and R. R. Frankel (hereinafter collectively referred to as "Applicants") and hereby make application, pursuant to and in accordance with the provisions of Order No. 174-A issued by the Federal Power Commission on August 6, 1954, in Docket No. R-138, as amended, and Section 7 of the Natural Gas Act, as amended, for a Certificate of Public Convenience and Necessity covering the proposed sale of natural gas as hereinafter particularly described.

Applicants specifically reserve the right to pursue any and all remedies which they may have relating to the asserted jurisdiction by the Federal Power Commission and this application is filed without prejudice to such rights.

In support of their application Applicants respectfully show as follows:

A7259

I.

Description of Applicants

(Section 157.24 (a) (1) and (2))

The exact legal name of Applicants herein are (a) J. R. Frankel, an individual, having his principal place of business at 940 Mellie Esperson Building, Houston, Texas, and (b) R. R. Frankel, an individual having his principal place of business at 940 Mellie Esperson Building, Houston, Texas. Each of the Applicants conducts his business in Louisiana from an officer at 222 Shell Building, New Orleans, Louisiana. Each of the Applicants has been doing business continuously in Louisiana as an individual since prior to the year 1940. The contemplated sale is new and is to be performed wholly within the Parish of Lafourche, State of Louisiana.

II.

Persons on Whom Papers Are To Be Served

(Section 157.23(3))

The name, title and post office address of the persons to whom correspondence or communications in regard to this application are to be addressed are:

Harry A. Poth, Jr.
910 17th St., N.W.
Washington, D. C.
and
H. H. Hillyer, Jr.
1122 Whitney Building
New Orleans, Louisiana

III.

Service To Be Certificated

(Sections 157.24 (a) (4))

Applicants propose to sell natural gas to Transcontinental Gas Pipe Line Corporation ("Transcontinental") at a delivery point located on one of leases of J. R. Frankel in the North Thibodaux Field, Township 14, South, Range 16 East, Lafourche Parish, Louisiana, commencing not later than March 1, 1958, pursuant to a contract which is attached hereto as Exhibit "B". Applicants are informed and, therefore, allege that Transcontinental is engaged in the transportation and sale of natural gas in interstate commerce and is a natural gas company within the meaning of the Natural Gas Act, as amended.

IV.

Sources of Gas

(Section 157.24(a)(4) (i))

All of the gas sold and delivered to Transcontinental will be produced by Applicants from acreage under lease to and controlled by Applicants in the North Thibodaux Field, which is located in Lafourche Parish, Louisiana. None of the gas involved will be purchased by Applicants from third parties. At the present time Applicant J. R. Frankel alone has gas available for delivery to Transcontinental, no wells having been drilled by R. R. Frankel. However, R. R. Frankel joins in this application inasmuch as, by the contract annexed as Exhibit "B", his leases in said area have been dedicated to the performance of said contract.

The location of the North Thibodaux Field and the wells therein are shown on Exhibit "A" attached hereto. The leases owned and controlled by Applicants in the North Thibodaux Field from which the gas proposed to be sold is to be produced, are likewise shown on Exhibit "A".

The gas is to be delivered at a central delivery point in Section 110 or Section 11, T. 14 S., R. 16 E.

V.

Routes of Pipeline

(Section 157.24(a)(4) (ii))

Applicant, J. R. Frankel, will construct such gathering lines as may be necessary to transport the gas in question from the well or wells to the central delivery point above mentioned. The route of the pipeline by means of which the gas sold by Applicants will be transported by Transcontinental will be shown by the exhibits annexed to the application of Transcontinental for a certificate authorizing the construction thereof.

VI.

Communities Served

(Section 157.23(a)(4) (iii))

Applicants were not serving natural gas on June 7, 1954, to any communities either at wholesale or at retail nor do Applicants propose any such service in this Application. The new service now proposed is solely the sale of natural gas produced by Applicant, J. R. Frankel, to Transcontinental.

A7262

VII.

Main Line Industrial Customers

(Section 157.24(4) (iv))

Applicants were not selling gas to "main line industrial customers" on June 7, 1954, and do not propose to make any such sales under this Application.

VIII.

Major Appurtenances

(Section 157.24(a)(4)(v))

Applicants do not propose to construct or use any major appurtenant properties and facilities in connection with the proposed sale to Transcontinental.

IX.

Other Authorizations Required

(Section 157.23(b))

In an application filed concurrently herewith, Transcontinental is seeking authorization to construct and operate facilities to enable it to take the gas to be delivered by Applicant, J. R. Frankel. In addition, applicants are informed that other independent producers will concurrently file certificate applications seeking authorization to sell gas to Transcontinental in connection with this project.

X.

Other Information

(Section 157.27)

In anticipation that the Commission might desire other information as to Applicant's production, Applicants show

that the acreage under lease to and controlled by Applicants in the North

Thibodaux Area amount to approximately 3,400 acres; that the estimated gas reserve in place under Applicant's acreage amounts to approximately 55,000,000 Mcf.

XI.

Exhibits

(Section 157.25)

Exhibit A—Location of Facilities.

There is attached hereto as Exhibit "A" a map showing:

(a) The location of the gas field from which gas is to be produced by Applicants and sold; and

(b) Not showing, however, the location of any pipe lines of the Applicant, J. R. Frankel, since said Applicant proposes only to construct small gathering lines from the wells to the point of delivery; and

(c) Applicants do not propose to make connection with the facilities or pipe line systems of other companies except insofar as the sale to Transcontinental herein referred to is shown and, accordingly, the only such point of connection with Transcontinental will be at a point located in Section 110 or in Section 111, T. 14 S., R. 16 E.; and

(d) There will be no delivery to Applicants' facilities since Applicants merely propose a sale of gas produced by Applicants; and

(e) No communities are proposed to be served by this Application; and

(f) No main line industrial customers are proposed to be served by this Application.

Exhibit B—Service Contract

There is attached hereto as Exhibit "B" a true and correct

copy of the contract between Applicants and Transcontinental under which Applicants propose to sell the gas produced by Applicants in the North Thibodaux Field.

WHEREFORE, J. R. Frankel and R. R. Frankel (each for his own interest and not for the interest of the other) respectfully request:

(1) That the Commission issue to J. R. Frankel a Certificate of Public Convenience and Necessity authorizing him to render the service and make the sale described in this Application; and

(2) That this Application be disposed of in accordance with the shortened procedure provided for in Rule 1.32 of the Commission's Rules of Practice and Procedure, and in this connection, Applicants request that the intermediate decision procedure be omitted and waive oral hearings and opportunity for filing exceptions to the decision of the Commission; and

(3) Such other and further relief as may appear warranted in the premises.

Respectfully submitted,

J. R. FRANKEL
R. R. FRANKEL

A10342

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Jerome K. Kuykendall, Chairman, William R. Connole and John B. Hussey

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Docket Nos. G-13143, G-13590 and G-13745

Docket No. G-13793

Docket Nos. G-13169, *et al.*[1]

In the Matters of

TRANSCONTINENTAL GAS PIPE LINE CORPORATION
NEW YORK STATE NATURAL GAS CORPORATION
TEXAS EASTERN TRANSMISSION CORPORATION
TRANSCONTINENTAL GAS PIPE LINE CORPORATION
TEXACO SEABOARD INC., *et al.* (successor to Seaboard Oil Company)

---

[1] As set forth in a motion and an amended application filed herein June 6, 1958, all of Seaboard Oil Company's oil and gas producing properties and contracts have been acquired by "Texaco Seaboard Inc." which requests that it be substituted for Seaboard as applicant herein, waiving such of the Commission's Rules as may be necessary to this end. No objections having been received, it is appropriate that the request be granted and our order shall so provide. For convenience we shall refer to this party as Seaboard and to the producer proceedings as the Seaboard proceedings.

Opinion No. 315

Opinion and Order Granting Certificates of Public Convenience and Necessity Under Section 7(e) of the Act, Severing Issues and Deferring Decision Thereon, and Modifying and Affirming Initial Decisions of the Presiding Examiner

(Issued September 4, 1958)

* * * * * * * * * *

A10344

THE COMMISSION'S DETERMINATIONS

The applications of the producers in the Seaboard Dockets, Nos. G-13169, et al.

As indicated above, the presiding examiner in his *Seaboard* decision in Docket Nos. G-13169, *et al.*, held that certificates of public convenience and necessity should issue in 38 of the 39 dockets wherein independent producers seek certificates authorizing the sale of their gas to Transco.[4] The sales in question involve approximately two trillion cubic feet (2,000,000,000 Mcf) of natural gas to be produced in southern Louisiana and off-shore adjacent areas, and constitute the supply necessary for Transco's proposed system expansion. The prices for the sales provided for in the gas purchase contracts between the producers and Transco range from 22.4 cents to 23.3 cents per Mcf.

The examiner concluded that the elements properly to be considered in determining public convenience and necessity, as contained in the Act and as applied in Commission and judicial decisions, were satisfied. Applying our order issued March 31, 1958, in *Matter of Hope Natural Gas*

[4] One producer, Arkansas Fuel Oil Corporation, filed notice of withdrawal of its application on April 24, 1958, and its application may be deemed withdrawn under the Commission's Rules of Practice and Procedure.

Company, Docket Nos. G-12571, *et al.*,[5] he found that there is a market for the producers' sales at the prices proposed and that their proposed projects are economically feasible at the prices proposed; and he held that a *prima facie* showing had been made justifying the issuance of certificates to the producers.

The examiner further concluded that under our opinion No. 309 and accompanying order issued March 31, 1958, in *Matters of Seaboard Oil Company*, Docket Nos. G-11970, *et al.*, no sufficient evidence had been adduced to rebut the producers' *prima facie* showing or justify the imposition of a rate condition reducing their proposed initial prices. He pointed out that no evidence was adduced to show that the producers' initial rates were unreasonable; and held that the fact that the prices were higher than those being paid by Transco for other gas, which was the character of the evidence adduced by staff, did not make them unreasonable *per se*. He noted further that although the prices proposed by the producers were higher than previous purchases by Transco, they did not establish a new price plateau in the southern Louisiana area. Likewise, as the examiner observed, even assuming that the proposed prices could "trigger" existing prices with claimed resulting annual increases in prices for gas to Transco of some $5,000,000, no such increases could materialize absent Commission approval of filings for proposed increases.

[5] We held there that (mimeo., p. 3):

"We are of the view that if the [independent producer] applicant proves there is a market for the gas at the proposed price and that the project is economically feasible at the proposed price (both market and economic feasibility being factors which we consider in determining public convenience and necessity) that it has sustained its burden of going forward with the evidence, and in the absence of evidence showing that the proposed price or rate adversely affect the public convenience and necessity, the applicant has made out a *prima facie* case, and a certificate should issue to it."

For these and other reasons the examiner was of the view that there was no substantial evidence of an adverse effect on the public or the consumer from the producers' proposed rates. Accordingly, he concluded that the sales by the producers to Transco should be certificated at the prices proposed, and refused to attach initial rate conditions reducing the initial prices to 17 cents per Mcf from a proposed range of 22.4-23.3 cents per Mcf, as advocated by staff and some of the representatives of consumer interests.

The public convenience and necessity.—We are of the opinion that the presiding examiner reached the correct result and that his basic conclusions summarized above are sound, although we are unable to agree

with certain of the qualifying language contained in his decision hereinafter discussed. We agree with the examiner that certificates should be issued to the producers authorizing their sales of natural gas to Transco at the initial rates provided for in their respective sales contracts without any rate conditions.

It must be kept in mind in considering all these certificate cases that the "public convenience and necessity," the prevalent standard in determining whether a requested authorization should be granted under Section 7(e), is not a rigid absolute of unchanging content, to be mechanically applied regardless of the wide diversity of facts presented by different cases. This criterion, a "supple instrument for the expert body which Congress has charged to carry out its legislature policy," is and can only be as "concrete as the complicated factors for judgment in such a field of delegated authority permit," *F.C.C.* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 138. These fac-

tors are diverse and they change[6] so that " 'The requirement is to be interpreted by its context' "—by the nature of the business regulated, by the " 'scope, character and quality of services,' " to mention only some of the pertinent circumstances.[7]

In a word, public convenience and necessity is a "complex"[8] encompassing numerous elements which in diversity and importance vary with the circumstances of particular cases; and in determining whether a certificate should issue, we must weigh the relative importance of the several factors involved, as well as balance the favorable against the unfavorable, if any. Furthermore, in evaluating the circumstances of a particular case it may well be that, in the judgment of the agency to which decision is entrusted, an aspect of a proposal not wholly desirable standing alone should be accepted where offsetting favorable features exist which would in sum total yield a greater public good, so long as all minimal requirements are satisfied.[9]

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[6] The language of the Supreme Court in the *Pottsville* case, respecting the similar language, "public convenience, interest, or necessity" applicable by the Communications Act has equal force here with respect to the natural-gas industry (309 U.S. at 138):

> ". . . Underlying the whole law is recognition of the rapidly fluctuating factors characteristic of the evolution of the . . . [natural-gas industry] and of the corresponding requirement that the administrative process possesses sufficient flexibility to adjust itself to these factors."

[7] The language of the Supreme Court in *National Broadcasting Co.* v. *U. S.*, 319 U.S. 190, 216 (1943), quoting its earlier decision in *Federal Radio Comm'n* v. *Nelson Bros. Co.*, 289 U.S. 266, 285.

[8] *National Coal Ass'n* v. *F.P.C.*, 191 F. 2d 462, 467 (CADC, 1951).

[9] *Cf., Scripps Howard Radio* v. *F.C.C.*, 189 F. 2d 677 (CADC, 1951), *cert.* den., 324 U.S. 380.

This is the law as we have understood and applied it for many years. And the courts have rather uniformly agreed with this interpretation.

Price is an element in determining public convenience and necessity in a producer certificate case. But price is only one factor. And in circumstances such as those which exist in this case, the importance of price in relation to the other elements involved may be materially lessened.[9a] Nor do we view the price question as "latent," in the words of the examiner. The issue is presently before us. The state of this record, however, permits of but one conclusion—that no basis exists either for denying the producer certificates requested on the ground of price or for attaching to them rate conditions reducing the initial rates below the levels proposed in the producer contracts.

The presiding examiner's findings on the price issue are fully supported by the facts, which sufficiently satisfy the minimum standards of law applicable in a case of this kind. There is no evidence in this record to show that the producer prices proposed are unreasonable and it is impracticable within the confines of a certificate proceeding to apply a cost-of-service formula under Sections 4 and 5 of the Act to determine just and reasonable rates for initial sales of producers. Likewise, the producer prices

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[9a] Indeed, our experience discloses that in the context of a producer certificate proceeding, many of the elements of public convenience and necessity we ordinarily consult in pipeline proceedings take on a different connotation or lose much of their pertinency. For example, the engineering aspects of a proposed pipeline project traversing rugged and inaccessible mountains or squestered population centers is important in pipeline certificate cases. Not so in producer certificate cases where often the only facilities involved are short connecting lines to the points of delivery, plus the necessary appurtenant meters, valves, etc., respecting which problems of design and construction are practically non-existent. And in varying degrees the same is to be said of markets and economic feasibility and the like.

proposed do not set a new price level, since other pipelines are buying gas in the general area in the same price range. Nor is there evidence from which it can be found that the ultimate consumers of gas will be materially adversely affected by reason of the prices Transco will pay. In relation to all the facts, the prospective price increase to Transco's customers as a result of these producer prices does not establish an adverse effect justifying rate conditions. Indeed, according to Transco, during the time the company, acutely aware of the increasing demands on its system, was negotiating for these supplies, it apprised its principal

customers of what prices it would have to pay and what reserves it could acquire at those prices. Possessed of this information, these customers did not hesitate to commit with Transco for the purchase of these new supplies of gas. In fact, to avoid the restrictive effects of the *Memphis* case, *Memphis Light, Gas & Water Div.* v. *F.P.C.*, 250 F. 2d 402, the distributing companies have agreed with Transco to pay up to two cents more to Transco to meet possible increased costs to Transco for gas involved in this case, reserving of course their rights to contest any increase.

And the reason for this is obvious. A whole expansion program, the largest proposed by Transco since the pipeline commenced operations, is involved in these proceedings—a program of which the distributing companies are the chief beneficiaries. The record shows the urgent need for the supplies of gas this program would make available to meet Transco's resale gas system requirements commencing with the coming winter. Transco states that to limit it to paying 17 cents for gas would prevent the company's acquiring any new gas, would prevent its further expansion and would remove hope of meeting the increased

demands of its customers and their consumers for natural gas. Without this gas, Transco will experience a peak day deficiency next winter of 117,000 Mcf in meeting such requirements which will increase to 171,000 Mcf by 1961. Without these supplies, most likely these customers would at best find it necessary to purchase gas at higher prices elsewhere. In our judgment, a consideration of all the factors giving to each its appropriate weight can read only to the conclusion that public convenience and necessity requires the certification of the producer sales at the initial prices proposed, a conclusion further fortified by the additional considerations discussed in connection with the parties' exceptions, *infra*, pp. 9-11.

Furthermore, if a rate condition is to be imposed, there must be some evidential showing to establish what the new rate should be. It is not sufficient to select arbitrarily or at random some price a few cents lower than that proposed by the producer. The new price must be arrived at on the basis of facts, in the application of some rational criterion, if the condition imposing it is to be found "reasonable" as Section 7(e) requires. No such facts or criterion are present in this case. One intervener suggested that the Commission fix an initial rate of 9.79 cents per Mcf, said to be the only rate which Transco is paying in the southern Louisiana area the reasonableness of which is not challenged. Others and staff picked out 17 cents, based on a list of contracts, many of them older ones not shown to be even remotely comparable to those in this case. The very disparity in these prices suggests their inconclusive character. The price evidence in this record does not, in our judgment, provide any reasonable basis for a condition reducing a proposed producer rate.

Parenthetically, it seems that recent judicial decisions in the Supreme Court's *Mobile* decision[10] and the Tenth Circuit's decision in *Phillips Petroleum Company* v. *F.P.C.*[11] draw into question the extent of our power to alter or vary the terms of initial contracts between producers and purchasers. Although neither involved reducing by the imposition of a condition the rate in a producer contract, both involved the generic question presented in such a case, namely, Commission authority to require changes in the price provisions in the contract between a seller and a purchaser.

In the *Mobile* case, the Supreme Court denied our authority, stating that the Act "evinces no purpose to abrogate private rate contracts as such," but that it expressly recognizes that "rates to particular customers may be set by individual contracts" (*id.*, p. 338), and that under the Act, "the rate-making powers of natural-gas companies were to be no different from those they would possess in the absence of the Act: To establish *ex parte*, and change at will, the rates offered to prospective customers; or to fix by contract, and change only by mutual agreement, the rate agreement, the rate agreed upon with a particular customer" (*id.*, p. 343). And in the Tenth Circuit *Phillips* case, the court was equally explicit, saying that (mimeo. ed., p. 17), "Under the Natural Gas Act the rate to be charged for natural gas is initially fixed by contract between the seller and the purchaser" (citing *Mobile*), "... but the Commission has no initial rate-making powers and an initial rate fixed by contract remains in effect un-

[10] *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp., et al.*, 350 U.S. 332.

[11] *Phillips Petroleum Co.* v. *F.P.C.*, No. 5695, filed July 23, 1958.

less and until it is changed in a proceeding under § 5(a) of the Natural Gas Act."

The full implications of these cases are not clearly apparent, but they suggest that the practical difficulties which we have encountered in finding a rational and workable basis for imposing rate conditions may reflect and result from what, in contrast to *Signal Oil and Gas Co.* v. *F.P.C.*, 238 F. 2d 771, these decisions evidently view as an underlying absence of legal authority in the premises.

Accordingly, we conclude that the producers' certificates should not carry any initial rate conditions. We reach this conclusion not on any technical consideration of who has the burden of proof or of going forward with the evidence. Nor do we minimize the importance of price which, on

the contrary, we recognize as a central issue in the case. We do, however, decline to substitute any desideratum of our own, laudable though it may be, for the findings called for by the facts and the statute. In the exercise of our judgment we reach this conclusion on a fundamental consideration of the evidence in the record before us, including price data as well as evidence of the claimed adverse effects on the public of the proposed rates for the sales, illumed by the law as found by the courts and applied by this Commission. These are the factors on which we base our conclusion that certificates should issue to the producers and that no sufficient basis exists for attaching to them any conditions reducing the proposed initial rates for the sales.

To this we may add, however, although our decision herein is not grounded on this fact, that in our considered opinion an approach by this Commission advocated by some, by which it would act as a kind of peace-time OPA

for the natural-gas producing industry and under the narrow "conditions" provision of the certificate section of the Act and outside the rate provisions thereof, undertake to prevent all price increases and force back the price level for all initial producer sales on the basis of a price-ceiling type of regulation would, assuming its legality, disregard the historical and economic factors which presently enter into determining the price for each particular sale, would be fundamentally inconsistent with the character of and conditions prevailing in the gas producing industry, would give rise to profound dislocations in the relationships of price, supply and demand, and whatever short-range price benefits it might produce, would on a long term basis be antithetical to the interests of the public and the consumer.

Exceptions of consumer interests.—Of the many distributing companies and other customers of Transco which would ultimately receive and pay for this gas, only two—The United Gas Improvement Company (UGI) and the Philadelphia Electric Company, which are joined by the New York Public Service Commission—have any quarrel with the examiner's certification of the producers' sales. By and large, in substance their objections have been sufficiently dealt with in the preceding discussion, to which little need be added.

A10351

The Philadelphia Electric Company in its exceptions briefly states that the Commission should either limit the producer prices to 17 cents per Mcf or provide for a rate proceeding under Sections 4 or 5 of the Act to test the contract rates. The rates of the producers are subject to our continuing supervision and control and if after further study the need becomes apparent we shall institute a Section 5 proceeding. Of course, initial rates are not sub-

ject to suspension under Section 4 and proposed increases must be considered on their own merits.

The exceptions of UGI and the New York Commission are more extensive. Treating them together to simplify and avoid repetition, both parties object to the examiner's refusal to impose a 17-cent initial rate condition. They argue, first, that the examiner's reliance of our *Hope* order reduces the test of public convenience and necessity to a nullity and gives no regard to whether the sale is in the public intreest. However, under the explicit terms of that order the effects on the public interest of the sale—whether or not its certification at the price proposed will adversely affect the public—is a central issue in the case. In so providing, that order gives proper recognition to the fact that in producer and pipeline cases the other requirements of public convenience and necessity also differ in important particulars and relegates requirements of lesser importance to a subordinate place.

Second, UGI and the New York Commission contend that on the facts the examiner erred in concluding that there was no substantial evidence of harm to the public from the certification of these producers' sales at the prices proposed. They argue that triggering would increase the price of gas purchased by Transco and ultimately the consumer by as much as $5,000,000 a year. The fact is, however, that before any such "triggered" increases could be passed along, filings for increased rates would have to be made by the producers and these would be subject to our scrutiny and control under the rate suspension provisions of Section 4 of the Act.

In connection with the question of effects on the public, we have referred to some of these sales' beneficial effects in meeting the urgent need of Transco's customers for gas at an acceptable price, a matter further considered in

our discussion of Transco's proposals.[11a] The reserves proposed to be committed to Transco's service in this proceeding are among the largest ever to be involved in a single project of this kind. The demands on Transco's system are enormous and increasing.

In these days, substantial blocks of gas are no longer available at bargain prices. In such a context, other factors such as the extent of reserves and the assurance of a continued and reliable supply reasonably assume greater importance. Although without evidentiary value, the fact that the great majority of distributing companies and representatives of consumer interests have filed no objection to the certification of these producers' sales at the price approved by the examiner suggests that their judgment of where, as between price and supply their best interests lie, is not greatly at variance with the presiding examiner's and our own.

Third, UGI and the New York Commission contend that the examiner did not correctly apply the Commission's decision in the *Seaboard Oil Company* opinion No. 309, *op. cit.*, and the *Signal* opinion No. 288.[12] They argue that the *Seaboard* opinion involves different facts and should not be applied here, but that *Signal* should be applied in order to "hold the line" on prices.

In *Seaboard* we discussed why a certificate proceeding is not an appropriate place to try rate matters. Generally, that discussion is pertinent here. We pointed out, how-

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[11a] Transco's proposals and the contentions of the New York Commission respecting them and the *"Catco"* decision of the Court of Appeals for the Third Circuit in *P.S.C. of New York* v. *F.P.C.*, No. 12,401, June 30, 1958, are discussed *infra*.

[12] Opinion No. 288 issued November 28, 1955, in *Matters of Cities Service Gas Company, et al.*, Docket Nos. G-2569, *et al.*, affirmed, *Signal Oil and Gas Co.* v. *F.P.C.*, 238 F. 2d 771, *cert.* den., 353 U.S. 923.

ever, that we would consider evidence showing that the producer's proposed price or rate adversely affects the public convenience and necessity, a holding we hereinabove reaffirm. In *Signal* we made it clear that the particular circumstances presented in each case are of decisive importance in determining whether a condition like that imposed there should be attached to the issuance of a certificate of a producer.[13] These circumstances include whether a showing has been made that as a result of the price proposed, the prices for other sales in the area in question will be increased, keeping in mind such relevant factors as the kind and quality of gas involved, competition present in the area, and similarity between the questioned contract and the other contracts.

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A10364

Exceptions of the New York Commission.—Exceptions were also filed to the examiner's decision in the *Transco* proceedings by the Public Service Commission of New York which in general advances the same objections it makes to the examiner's decision on the producers' applications. The New York Commission argues that certificates should not be issued in these proceedings unless and until the Commission reverses the decision of the examiner in the *Seaboard* cases and attaches initial rate conditions to the certificates of the producers, contending that absent such conditions there can be no legally supportable basis for the indispensable finding that gas supplies at appropriate prices are available to support the pipeline project.

Also, the New York Commission argues that no proof

[13] We stated in *Signal* that "the facts of this case" require the imposition of a condition and that "clearly the basis for decision in this proceeding is not necessarily controlling in any future proceeding involving the rates of Signal or any other independent producer."

was adduced to support the contract price for the producers' gas, only the "familiar threats to terminate their contracts and reject certificates conditioned as to price" (exceptions, p. 2). It says that the evidence does not sustain a finding that the sales at the contract prices are required by public convenience and necessity. It calls attention to the recent decision of the Third Circuit in the *Catco* case (*P.S.C. of New York* v. *F.P.C.*, No. 12401, *et al.*, June 30, 1958), which it says precludes the Commission from considering threats to terminate contracts or withhold gas from market, in passing on the public convenience and necessity

By and large, what we have already said on the producer aspect of this case disposes of these arguments. The price to the producer of itself is not invariably the determinative factor in a pipeline certificate case the New York Commission evidently supposes. It is but one element to be considered with many. Certainly in the present context such factors as the assurance of supply in meeting urgent and extensive demands on Transco's system can reasonably be found to outweigh such undesirable aspects of the prices proposed by the producers as may exist in this case, where, as here, the price is reasonably justified and there is no substantial showing of adverse effects from such prices on the public. Respecting the *Transco* authorizations, none of Transco's customers have excepted to the certification of the project on the ground that the producers' prices are out of line or would have harmful effects on the public.[17] These companies are aware

of their service obligations and their livelihood depends on receiving this service from Transco at reasonable prices.

[17] As previously discussed, two utilities excepted to the examiner's decision in the producer cases in Docket Nos. G-13167, *et al.*

Here as in the producer dockets their judgment evidently coincides with the presiding examiner's and our own as to the propriety of the prices proposed.

As to claimed producer threats, there are no such threats in this case. Various producers have reserved the right to terminate their contracts of sale with Transco if the seller does not obtain a satisfactory certificate. We do not consider such reservations to be any limitation upon our right of inquiry into proposed rates set forth in the several producer contracts. It must be recognized, however, that this Commission cannot force a producer to accept a certificate if it does not desire to, any more than we can force New York Natural to accept a certificate and transfer the properties involved in the proposed storage project previously discussed. Despite this, we do not here nor have we ever foregone consideration of price in the formulation of our judgment of where the public convenience and necessity lies. Where the possibility of the non-acceptance of a certificate exists, we think the proper course is the same followed in every certificate case—to consider the competing factors, evaluate the alternatives, and decide as the public convenience and necessity requires.

The Commission further finds:

(1) Each of the independent producers enumerated in the initial decision of the presiding examiner issued June 17, 1958, in Docket Nos. G-13169, *et al.*, with the exception of Arkansas Fuel Oil Corporation, is or upon initiation of the proposed sales to Transcontinental Gas Pipe Line Corporation will be engaged in the sale of natural gas in interstate commerce for resale for ultimate public consumption, subject to the jurisdiction of the Commission, and will therefore be a "natural-gas company" within the meaning of the Natural Gas Act.

(2) The sales of natural gas proposed by each of the producer applicants, as more fully described in the presiding examiner's decision and the applications, are subject to the Commission's jurisdiction under the Act; and such sales, together with the construction and operation of any facilities used for such sales subject to the jurisdiction of the Commission, are required by the public convenience and necessity under Section 7(e) of the Act, and a certificate therefor should be issued as hereinafter ordered, on the terms and conditions of our order.

(3) Subject to the requirements prescribed in our order hereto, each of the producer applicants is able and willing to do the acts and perform the service proposed and to conform to the provisions of the Act and the requirements, rules and regulations of the Commission thereunder.

(4) Transcontinental Gas Pipe Line Corporation, a Delaware corporation having its principal place of business in Houston, Texas, is a "natural-gas company" within the meaning of the Act, as the Commission has heretofore found.

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A10367

The Commission orders:

(A) Certificates of public convenience and necessity are hereby issued to the parties in each of the proceedings referred to in paragraph (1) above, authorizing the sales by the applicants to Transco of natural gas in interstate commerce for resale, together with the construction and operation of any facilities subject to the jurisdiction of the Commission used for such sales, as more fully described in the presiding examiner's decision and the applications and exhibits in these proceedings.

(B) All producers which intend to accept the certificates issued in these proceedings shall file acceptances within ten days of the date of issuance of this order.

(C) The certificates herein issued are not transferable in any manner and shall be effective only so long as applicants continue the operations authorized by this order in accordance with the provisions of the Act and the rules, regulations and orders of the Commission.

(D) As a further condition attached to the certificates issued the producer applicants herein and to the exercise of the rights thereunder, each such applicant shall promptly refund to Transco that portion of the initial rate and charge constituting the reimbursement for the additional tax of one cent per Mcf provided for by the State of Louisiana under its Act No. 8 of 1958 (House Bill No. 303), as approved on June 16, 1958, amending Title 47 of the Lousiana Revised Statutes of 1950, paid by Transco, should such Tax be held invalid and refunded by the State of Louisiana; and to file appropriate rate changes reflecting such invalidation. These producers shall also refund to Transco any interest paid by the State of Louisiana. Each applicant shall also bear all costs of any such refunding and keep accurate accounts of the amount of such tax reimbursement hereunder. The Commission may require that such reimbursement be made at such times, in such manner and on such terms as in its judgment is reasonable and appropriate.

(E) The grant of the certificates to the producers herein shall not be construed as a waiver of the requirements of Section 4 of the Act, or of Section 154 of the Commission's Regulations thereunder requiring the filing of rate schedules for the service herein authorized; and is with-

out prejudice to any findings or orders which have been or may hereafter be made by the Commission in any proceeding now pending or hereafter instituted by or against the applicants. Further, our action in this proceeding shall not foreclose nor prejudice any future proceedings or objection relating to the operation of any price or related provision in the gas purchase contracts herein involved.

(F) With the exception of the matters set forth in paragraph (N) hereof, certificates of public convenience and necessity are hereby issued authorizing Transcontinental Gas Pipe Line Corporation to construct and operate the facilities described in the presiding examiner's decision, the amended applications and in the evidence of record, for the transportation and sale of natural gas as hereafter set forth.

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A10372

(Q) The initial decisions of the presiding examiner issued in *Matters of Transcontinental Gas Pipe Line Corporation,* Docket Nos. G-13143, *et al.,* and *Matters of Texaco Seaboard Inc., et al.,* Docket Nos. G-13169, *et al.,* are modified as hereinabove set forth and as so modified are, consistent with this opinion, adopted with this opinion as the decision of the Commission in these proceedings. Except to the limited extent granted hereinabove, the exceptions to the presiding examiner's decisions are hereby denied.

By the Commission. Chairman Kuykendall concurs in the result, adhering to the views expressed in his statement issued with Opinion No. 309, *In the Matter of Seaboard Oil Company, Operator, et al.,* Docket Nos. G-11970, *et al.*

Commissioner Connole dissenting.

JOSEPH H. GUTRIDE,
Secretary.

A10474

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners Jerome K. Kuykendall, Chairman; Frederick Stueck, William R. Connole, Arthur Kline and John Hussey.

In the Matters of

Docket Nos. G-13143, G-13590 and G-13745
Transcontinental Gas Pipe Line Corporation

Docket No. G-13793

New York State Natural Gas Corporation
Texas Eastern Transmission Corporation
Transcontinental Gas Pipe Line Corporation

Docket Nos. G-13169, *et al.*

Texaco Seaboard, Inc., *et al.* (successor to Seaboard Oil Company)

Order Denying Applications for Rehearing

(Issued October 31, 1958)

Applications for rehearing of the Commission's Opinion No. 315 and accompanying order issued September 4, 1958, in the above-entitled proceedings, were filed (1) by the Philadelphia Electric Company (Philadelphia Electric) on October 6, 1958; (2) by Philadelphia Gas Works Division of the United Gas Improvement Company (UGI) on October 3, 1958; and (3) by the Public Service Commission of the State of New York on October 6, 1958.[1] In Opinion No. 315, we authorized a $167,000,000 expansion by Transcontinental Gas Pipe Line Corporation (Transco) to serve 27

[1] Hereinafter collectively referred to as "Petitioners".

existing customers principally in the middle Atlantic states an additional total of 173,634 Mcf daily of contract demand and general service gas. We also authorized Transco to render storage service of 191,000 Mcf of gas per day to 10 existing customers. In addition, we authorized 26 independent producers of gas in southern Louisiana and offshore fields to sell to Transco the volumes necessary for this service.

Rehearing is requested solely on the ground that we improperly refused to attach conditions to the producers' certificates reducing the prices for their sales of gas to Transco from a range of 22.4-23.3 cents to 17 cents per Mcf. In support of this position the petitioners advance four principal contentions.

First, Philadelphia Electric and UGI contend that Opinion No. 315 is unlawful since the producers' prices have not been shown to be "just and reasonable" under Sections 4 and 5 of the Act. UGI in particular

argues at length that under the Supreme Court's *Phillips* decision, *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672, and Third Circuit's *Signal* decision (*Signal Oil & Gas Co.* v. *F.P.C.*, 238 F. 2d 771, certiorari denied, 353 U.S. 923), the language of Section 4(a) that "All rates and charges made . . . shall be just and reasonable" applies to the prices proposed in applications for certificates of public convenience and necessity under Section 7(e); and that since there has been no showing in this case that the producers' prices are reasonable, the applications must either be denied or conditioned. However, neither of the cases cited impose any such requirement. It has long been judicially recognized that the Commission has authority to impose a rate condition in issuing a certificate of public convenience and necessity (*Arkansas-Louisiana Gas Co.* v. *F.P.C.*, 113 F. 2d 281 (CA5,

1940)). The question is, when is a rate condition appropriate?

Contrary to the assertion by UGI that the Commission may not be able to employ exactly the same standards for determining a "just and reasonable rate" as it would use in rate proceedings under Section 4, the fact is that if we are to determine in a certificate proceeding under Section 7 what initial rates are just and reasonable, the same standards would have to be applied as in similar rate determinations under Sections 4 or 5. Actually, however, no definitive tests have as yet been evolved for fixing the just and reasonable rates of independent producers, although rate proceedings to this end are in progress.

In acting on the application of 26 producers in this proceeding the Commission would not, as in the *Signal* case,[2] be able to confine its consideration to the narrow question of raising a general rate level, but these petitioners would have the Commission make findings concerning the justness and reasonableness of these proposed rates. This epitomizes the administrative impracticability of a requirement along the lines suggested by these two petitioners.

Second, UGI and the New York Commission contend that the Commission in Opinion No. 315 has applied new and improper standards in passing on certificates of public convenience and necessity, standards which reduce the requirements of public convenience and necessity to a nullity and which depart from the holdings in the *Signal* case.

One of the tasks which has confronted the Commission since the Supreme Court's decision in *Phillips,* has been that of applying the certificate provisions of Section 7 to independent producers. The difficult process of developing

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[2] The Commission's opinion appears as *Cities Service Gas Co., et al.,* Opinion No. 288, issued November 28, 1955 (14 F.P.C. ...), affirmed in the *Signal* case referred to in footnote 1.

regulatory standards applicable to this new segment of the natural-gas industry has advanced along several

avenues. After failing to find any reasonable formula of general applicability in our rule-making proceeding, Docket No. R-142, terminated on December 1, 1955, we have proceeded on a case-by-case basis in the light of the particular facts presented in concrete cases. The standard of "public convenience and necessity" embraces not only rate conditions in certificate cases, as in the *Signal* case, but other elements of concern to consumers. First, we have settled many questions of jurisdiction over types of producers and the facilities of producers, so as to give the controls held applicable to producers full play. Next we have been sustained in applying rate filings and suspension rules to producers. Other factors have also had a place.[3]

In applying this standard to pipelines we early set forth certain factors which in our judgment a pipeline proposal could reasonably be measured against. *Cf. Kansas Pipe Line & Gas Company, et al.*, 2 F.P.C. 29. Those factors we have applied and adapted over the years to meet the needs of particular cases. See *e.g.*, Opinion No. 301 issued December 28, 1956, in *Houston Texas Gas and Oil Corp.*, 16 F.P.C. 118. But it is clear beyond the shadow of a doubt that the criteria which we have evolved and applied in pipeline cases do not and cannot apply in their entirety and to full extent to the producer segment of the industry.

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[3] See, *e.g.*, Opinion Nos. 287 and 287-A, issued January 20, 1956, in *Anthony J. Tamborello, et al.*, 15 F.P.C. 4; Opinion No. 299, issued December 4, 1956, in *Natural Gas Pipeline Company of America*, 16 F.P.C. 80; Opinion No. 309, issued March 31, 1958, in *Seaboard Oil Company*, 19 F.P.C. 416; order issued April 7, 1958, in *Columbian Fuel Corporation*, 19 F.P.C. 479; order issued May 9, 1958, in *The Superior Oil Company, et al.*, Docket No. G-12121, *et al.*, 19 F.P.C. ...; order issued March 31, 1958, in *Hope Natural Gas Co., et al.*, 19 F.P.C. 405.

UGI admits as much in its application.[4] We must ascertain, as the Supreme Court has indicated we should do in applying a broad criterion of the statute, what are the particular factors which should be applied and what weight should be given them in this new context.

Our *Hope* order cited above describes some of the primarily administrative considerations which have a bearing on this problem. Thus we found in that case (19 F.P.C. at 408):

> The Commission has consistently held abridged hearings in independent producer certificate cases ever since regulation of independent producers was undertaken in 1954. We have issued thousands of such certificates under such a procedure without a dissent (footnote omitted). If as is now contended we must require positive proof that the sale is required at the proposed price we must abandon this procedure and set each case for formal hearing as to this issue.

And we pointed out that such a change in procedure would bring to a virtual halt the granting of certificate applications both to independent producers and pipelines whose applications are dependent on the certification of such sales.

Even in the *Kansas Pipe Line* case cited above, which involved a pipeline company and not a producer, we held that firm contracts for the sale of the gas were not necessary to a showing of markets but that it is sufficient that the applicants show there are reasonable grounds for anticipating customers will be attached to the proposed facilities.

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[4] Thus, at page 2 of its application UGI admits in a footnote that in producer certificate cases, ordinarily no financing is required. This is true and the same is to be said of various of the other elements present in pipeline cases, as discussed in Opinion No. 315.

"This approach," we stated at 2 F.P.C. 45, " has regard for the practical experience of the natural-gas industry and does not jeopardize the public interest." An approach equally realistic is called for if the problems which attend the regulation of producers are ever to be solved.[5]

In Opinion No. 315, here challenged by petitioners, without attempting any final or definitive holding for all time or all cases, we certificated the producers' sales in question. We did so, as we there stated, "not on any technical consideration of who has the burden of proof or of going forward with the evidence." We did so without minimizing the importance of price which, on the contrary, we stated that we recognized as a "central issue in the case." We did so because in our judgment, "on a fundamental consideration of the evidence in the record before us, including price data as well as evidence of the claimed adverse effects on the public of the proposed rates," no sufficient basis exists in this record for attaching to the producers' certificates any conditions reducing the proposed initial rates for the sales. In so doing we were required to consider what was unavoidably in issue in the case, namely, what standards were properly to be applied in a producer certificate case. But the thing of practical importance in this case to the public and all the parties is not whether the criteria employed were sufficiently comprehensive or refined to encompass all future cases—for obviously at this stage in their development they cannot be —but whether they are adequate in law and on the

[5] In the *Kansas Pipe Line* case we deferred consideration of rates. In this regard, we pointed out that as enacted in 1938, Section 7 (c) contained a direction that the Commission consider the applicant's ability to render service at rates lower than those prevailing in the territory to be served, "it being the intention of Congress that natural gas shall be sold . . . at the lowest possible reasonable rate consistent with the maintenance of adequate service in the public interest."

When this section was amended in 1942, this provision was deleted.

competing circumstances before us to justify the certification of the sales of the 26 producers and give Transco the gas it needs for its expansion to serve its customers. In our judgment they are.

Nor is it a fair statement to say that the Commission has departed from its *Signal* Opinion No. 288, cited above. For in that opinion, recognizing the dangers of broadside generalization in a new and uncertain area, we qualified our decision to point out that the imposition of a

condition there was designedly an interim measure (mimeo. ed., p. 24), "until time and experience have given us the opportunity to develop more comprehensive criteria governing determination of rates of independent producers," and that "A proceeding of this nature cannot and is not intended to take the place of a proceeding under Sections 4 or 5 of the Act." Furthermore, even on such an interim basis we subsequently went on to recognize in Opinion No. 299 in *Natural Gas Pipeline Company of America,* 16 F.P.C. 80 at 92, that to justify a condition such as that imposed in *Signal,* the showing made must be based on a consideration of such relevant factors as "the kind and quantity of the gas sold, the degree of competition present in the area, and the extent to which the producer contract in question resembles the other gas sales contracts in the area." This holding, too, the court affirmed in the *Oklahoma Natural* case, 257 F. 2d 634, 641.

Finally, UGI and the New York Commission contend that the primary purpose of the Act is to protect the consumer from excessive rates charged by natural-gas companies, and this requires the imposition of a rate condition. With this statement of the Act's general purpose no one would disagree. However, the Natural Gas Act is a statute and its terms are specific. Sections 4 and 5 deal with rates

and Section 7 with certificates. As the court said in the *Oklahoma Natural* case, 257 F. 2d at 634, "The Commission cannot be required to convert every certificate proceeding into a rate proceeding." Furthermore, we think that important public interests are served by a particular and exact observance of the terms of the statute as enacted by Congress.[6] As we said in Opinion No. 309, issued March 31, 1958, in *Seaboard Oil Company, et al.*, 19 F.P.C. 416 at 423-424:

> . . . Section 7 of the Act is distinctively the certificate section of the statute and is designed to serve purposes fundamentally different from those of the rate provisions of Sections 4 and 5 of the Act. The proper administration of the Act demands a close adherence to the intended scheme of the statute and the several objectives of the Act can best be achieved by following the channels specifically designed for the attainment of each.

A10479

The Commission further finds:

The assignments of error and grounds for rehearing set forth in the applications for rehearing filed by the Philadelphia Electric Company, the Philadelphia Gas Works Division of the United Gas Improvement Company, and by the Public Service Commission of the State of New York set forth no new facts or principles of law

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[6] We said in Opinion No. 292 and accompanying order issued June 30, 1956, in *Panhandle Eastern Pipe Line Co., et al.*, 15 F.P.C. 47 at p. 57, in refusing to impose a condition under Section 7 (e) in a pipeline case which would have had the effect of enlarging our authority beyond that limited in Section 5, that "Familiar rules of law and . . . a proper observance of the limitations which Congress and the courts have placed upon our authority both restrain us from pursuing such a course." Affirmed, *Central West Utilities Co. v. F.P.C.*, 247 F. 2d 306.

which were not fully considered by the Commission when it adopted its Opinion No. 315 and accompanying order issued herein September 4, 1958, or which having now been considered warrant any change or modification in said opinion and order.

The Commission orders:

The applications for rehearing of Opinion No. 315 and accompanying order filed herein (1) by the Philadelphia Electric Company on October 6, 1958, (2) by Philadelphia Gas Works Division of the United Gas Improvement Company on October 3, 1958, and (3) by the Public Service Commission of the State of New York on October 6, 1958, are hereby denied.

By the Commission. Commissioner Connole dissenting.

JOSEPH H. GUTRIDE,
Secretary.

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Contract No. 03297

9-12-58
State of Texas
County of Harris

Transcontinental Gas Pipe Line Corporation

Re: Docket G-16,387

Exhibit 6

Conformed Copy

Filed with Exrs. Certification dated 2-19-59

This Agreement, entered into the 17th day of September, 1958, between The Superior Oil Company, as "Seller", and Transcontinental Gas Pipe Line Corporation, as "Buyer".

(B164)

WITNESSETH:

THAT WHEREAS, under authority of Federal Power Commission Certificates of Public Convenience and Necessity, Buyer owns and operates a natural gas transmission pipe line system and now proposes, upon receipt of acceptable certification from said Federal Power Commission, to construct and operate additional facilities to such pipe line system (hereinafter called "new facilities") for the purpose of purchasing and receiving gas produced from offshore fields in the area of Southwest Louisiana; and

WHEREAS, Seller has natural gas producing acreage offshore of Vermilion Parish, Louisiana, outside the boundaries of said State, described in Exhibit "A" and outlined in plat marked Exhibit "A-1", both hereto attached and made a part hereof for all intents and purposes, and desires to produce therefrom and sell to Buyer natural gas in the quantities and upon the terms and conditions hereinafter set forth;

NOW, THEREFORE, in consideration of the premises and the mutual convenants herein contained, Seller and Buyer agree:

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ARTICLE I

Definitions

1. The following words and terms, wherever and whenever used or appearing in this agreement shall have the following scope or meaning:

(a) The word "day" shall mean a period of twenty-four (24) consecutive hours beginning and ending at 7:00 o'clock A.M. Central Standard Time.

(b) The words "calendar month" shall mean a period beginning at 7:00 o'clock A.M. on the first day of a calendar

month and ending at 7:00 o'clock A.M. on the first day of the next succeeding calendar month.

(c) The words "calendar year" shall mean a period of twelve (12) months beginning at 7:00 o'clock A.M. January 1, and ending at 7:00 o'clock A.M. on the following January 1.

(d) The term "Buyer's facilities" shall mean the new facilities, as above described, which Buyer proposes to build.

(e) The term "Seller's facilities" shall mean such facilities as are required for Seller to gather, dehydrate and deliver to Buyer at the delivery points established under Article X hereof at the required delivery pressure, gas of the quality and in the quantities herein established.

(f) The term "Mcf" shall mean one thousand (1,000) cubic feet of natural gas as determined on the measurement basis set forth in Article VIII hereof.

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(g) The term "date of first delivery" shall be that date following the construction, testing and completion of both Buyer's facilities and Seller's facilities on which natural gas is first delivered by Seller to Buyer's facilities.

(h) Commencing two (2) years from the date of first delivery, the "daily contract minimum" shall be that minimum daily quantity of gas which Seller is obligated to produce and deliver hereunder and which, averaged over each calendar year during the term hereof, Buyer is obligated to take, or to pay for if not taken, if available; and the "daily contract maximum" shall be that maximum daily quantity of gas which Buyer is entitled hereunder to purchase and receive, and which Seller shall have available for delivery to Buyer upon Buyer's request. The daily

contract minimum and the daily contract maximum shall be determined, both initially and subsequently, by the parties hereto in accordance with the provisions of Article XVII hereof.

(i) The term "BTU" shall mean British Termal Unit.

(j) The term "gas" or "natural gas" shall include casinghead gas produced with crude oil, natural gas from gas wells, and residue gas resulting from processing either casinghead gas, gas well gas or both.

ARTICLE II

Conditions

1. The performance of this agreement is conditioned upon the issuance of Certificates of Public Convenience and Necessity by the Federal Power Commission satisfactory to the

Seller, in Seller's sole judgment, authorizing Seller to sell the gas as provided hereunder and satisfactory to the Buyer, in Buyer's sole judgment, authorizing Buyer to construct and operate its new facilities as provided hereunder. Each party agrees to use due diligence to obtain the necessary governmental authorizations and in the event either party fails to obtain a Certificate of Public Convenience and Necessity, satisfactory to the party applying for same, from the Federal Power Commission within a period of nine (9) months following the date of filing of the last application for such certification, then either Buyer or Seller may, at its option, thereafter and prior to the issuance of such Certificates, terminate this agreement by written notice to the other party.

ARTICLE III

Construction of Facilities

1. Following acceptance of Certificates of Public Convenience and Necessity by both Buyer and Seller, each party agrees to use due diligence to construct, test and complete its facilities as herein defined.

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ARTICLE VI

Quantity of Gas

1. Subject to the terms and provisions of this agreement, Buyer agrees to purchase and receive at the points of delivery designated in Article X hereof, if available for delivery, the following quantities of Seller's gas.

(a) Commencing with the date of first delivery and for a period of one (1) year thereafter, Buyer agrees to take or to pay for if available and not taken, either an average daily minimum quantity of twenty-five million (25,000,000) cubic feet of gas from the Block 76 Field and an average daily minimum quantity of five million (5,000,000) cubic feet of gas from the Block 71 Field or a quantity of gas from each field which will be ratable, based on recoverable gas reserves, with purchases by Buyer from other sellers in each field, whichever quantity is greater; provided, however, that such quantity of gas Buyer is obligated to take from each field, or to pay for if available and not taken, shall be not greater than eighty per cent (80%) of the daily quantity of gas Seller is able to deliver from such field into Buyer's facilities.

(b) Commencing one (1) year from the date of first delivery and for a period of one (1) year thereafter, Buyer agrees to take or to pay for if available and not taken,

either an average daily minimum quantity of thirty-five million (35,000,000) cubic feet of gas from the Block 76 Field and an average daily minimum quantity of seven million (7,000,000)

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cubic feet of gas from the Block 71 Field or a quantity of gas from each field which will be ratable, based on recoverable gas reserves, with purchases by Buyer from other Sellers in each field, whichever quantity is greater; provided, however, that such quantity of gas Buyer is obligated to take from each field, or to pay for if available and not taken, shall be not greater than eighty per cent (80%) of the daily quantity of gas Seller is able to deliver from such field into Buyer's facilities.

(c) Commencing two (2) years from the date of first delivery, the daily contract minimum and the daily contract maximum quantities shall be established as a result of a joint determination of the then committed recoverable gas reserves which shall be made at least sixty (60) days prior to such commencement date in accordance with the provisions of Article XVII hereof.

2. Buyer, consistent with the operation of its pipe line system, shall take gas as nearly as practicable at uniform hourly rates of flow, and at uniform daily deliveries but it is understood that if during any one calendar year Buyer fails to take the total minimum which it is required to take or pay for during said year, Buyer shall have the right during the two (2) subsequent calendar years to take and receive an additional quantity of gas equal to the quantity paid for but not received during the previous year or years. If the volume of gas paid for but not taken during any year is made up during the next

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succeeding calendar year, Buyer shall have the right to receive such gas without further payment; however, if the period of make up extends beyond the next succeeding calendar year, then, for the volume of make up gas received subsequent to that year, Buyer shall pay any differential in price between that upon which payments were made and that applicable at the time of taking. The volumes of gas so made up during any subsequent calendar year or years shall not be considered a part of the minimum gas which Buyer is obligated to take or pay for during the current year.

3. Commencing two (2) years from the date of first delivery, if Seller fails on request of Buyer to deliver for any period of ninety (90) consecutive days, unless excused by force majeure, the daily volume requested by Buyer, not exceeding the daily contract maximum, Buyer may, by written notice to Seller given within thirty (30) days after the expiration of said ninety (90) day period, reduce the daily contract minimum to seventy-two per cent (72%) of the average daily quantity which Seller did deliver during such ninety (90) day period, and such average daily quantity delivered by Seller during such ninety (90) day period shall become the new daily contract maximum. In the event any such reduction is made in the daily contract minimum and Seller shall restore or increase its ability to deliver, Seller shall have the right, at any time during the period in which such reduced quantities are in effect, to so notify Buyer in writing, and to request tests of Seller's wells,

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in cooperation with Buyer, to determine such increased deliverability. If such tests establish Seller's increased ability

to deliver, then, and in that event, commencing ninety (90) days following the date of such determination, the daily contract minimum shall be increased to seventy-two per cent (72%) of the total daily quantity available for delivery to Buyer which shall be the lesser of (a) the maximum quantity Seller is able to deliver into Buyer's facilities as determined by actual deliverability test or tests, or (b) the maximum quantity which Seller may legally deliver hereunder, and such total daily quantity available for delivery to Buyer shall become the then effective daily contract maximum; provided, however, that any such new daily contract minimum and maximum shall in no event exceed the daily contract minimum and maximum established as the result of the last prior determination of reserves. Any reduced or increased daily contract minimum and maximum, as determined under this Paragraph 3, shall remain in force and effect until readjusted under the provisions of this Paragraph 3 or under the provisions of Article XVII hereof.

4. If withdrawals by others from a reservoir or common source of supply containing reserves committed hereunder cause drainage of Seller's reserves, Buyer shall be obligated to increase, within the limits of its line capacity, its receipts of gas therefrom to the extent necessary to equalize withdrawals and prevent drainage of Seller's said reserves, notwithstanding that Buyer may be thereby required to purchase in excess of the

daily minimum or maximum volumes above provided for. Buyer shall not be obligated to purchase and receive in excess of such maximum or minimum rates, respectively, if Seller, without jeopardizing its leasehold thereon or reserves thereunder, is able to decrease its withdrawals from other reserves and to increase its withdrawals from

such reserve or common source of supply to the extent necessary to prevent such drainage. If limitations of Buyer's line capacity prevents Buyer from so increasing its purchases to prevent drainage of Seller's reserves then as long as such condition persists Seller shall have the right to sell to others such gas as is necessary to equalize withdrawals and prevent drainage of Seller's reserves. If Buyer purchases from others gas produced from a reservoir or common source of supply containing any of the reserves of gas committed to the performance of this agreement, Buyer agrees to equalize withdrawals ratably so as to protect any of Seller's said reserves from drainage by its withdrawals from others.

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ARTICLE XII

Price

1. Subject to the other provisions of this agreement for quantities of gas delivered hereunder, or if available and not taken as herein required, Buyer shall pay Seller the following prices per Mcf:

(a) For gas delivered prior to July 1, 1962, twenty-one and four-tenths cents (21.4¢);

(b) From July 1, 1962 to July 1, 1966, twenty-three and four-tenths cents (23.4¢);

(c) From July 1, 1966 to July 1, 1970, twenty-five and four-tenths cents (25.4¢);

(d) From July 1, 1970 to July 1, 1974, twenty-seven and four-tenths cents (27.4¢);

(e) From July 1, 1974 and thereafter during the term hereof, twenty-nine and four-tenths cents (29.4¢);

all on the measurement basis set forth in Article VIII hereof.

2. Buyer agrees that if at any time during the term of this agreement any occupation, production, severance, gathering, compression, or sales tax or taxes of similar nature or equivalent in effect shall hereafter be validly imposed by any lawful authority on the gas delivered to Buyer pursuant to this agreement, or on the production, severance, gathering, or sale thereof, or any such existing tax is increased, so that Seller shall be required to pay such new tax or such increase either directly or through reimbursing others, Buyer shall, subject to the conditions hereinafter set forth reimburse Seller in the amount of three-fourths (¾ths) of any such new taxes or three-fourths (¾ths) of such increase in taxes, provided, however, that in computing such new taxes or increases in taxes there shall not be included income taxes, capital stock taxes, franchise taxes, general property taxes, or such other taxes of like nature as may hereafter be imposed or increased. In case any such reimbursement for taxes is to be made, Seller shall notify Buyer immediately setting forth the basis of such new tax or increase in taxes to be paid by Seller on gas delivered, and Buyer shall reimburse Seller monthly for three-fourths (¾ths) of the new taxes or increase in the amount of taxes paid or to be paid on gas delivered by Seller during the preceding calendar month.

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I. P. Memorandum No. 1887

Docketed Oct. 22, 1958

Docket No. G-16380

The Superior Oil Company

AIRMAIL

F. P. Jones, Jr., Vice President
The Superior Oil Company
400 Oil and Gas Building
Houston 2, Texas

Dear Mr. Jones:

The Superior Oil Company is hereby authorized to sell natural gas in interstate commerce to Transcontinental Gas Pipe Line Corporation as proposed in Docket No. G-16380.

Your contract dated September 17, 1958, as amended, with Transcontinental Gas Pipe Line Corporation has been accepted for filing to be effective on the date of initial delivery subject to the provisions of Sections 154.94 and 154.101 of the Commission's regulations under the Natural Gas Act. This filing is designated as follows:

Description	*Designation*
Contract 9-17-58	The Superior Oil Company FPC Gas Rate Schedule No. 78
Letter 9-17-58	Supplement No. 1 thereto

Please advise the Commission of the date of commencement of deliveries under such rate schedule, making reference in your communication to the rate schedule as designated by this Commission, namely, The Superior Oil Company FPC Gas Rate Schedule No. 78 and Supplement No. 1 thereto.

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This authorization and the acceptance of the above rate schedule are without prejudice to such final disposition of the application for certificate as the record may require and, furthermore, once service is commenced under this authorization it may not be discontinued without permission of the Commission pursuant to the provisions of the Natural Gas Act.

Very truly yours,
J. H. Gutride
Secretary

Approved by the Commission 10/22/58.

(Initials) M. B. K.
Secretary's Office

RGC
HFS/am
10-6-58

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UNITED STATES OF AMERICA, FEDERAL POWER COMMISSION

Before Commissioners: Jerome K. Kuykendall, Chairman; Frederick Stueck, Arthur Kline and John B. Hussey.

Docket Nos. G-16380, G-16387

In the Matters of

Superior Oil Company

Transcontinental Gas Pipe Line Corporation

Order Issuing Certificates of Public Convenience and Necessity and Modifying and Adopting Initial Decision of Presiding Examiner

(Issued August 10, 1959)

On February 19, 1959, the presiding examiner issued an initial decision in the above-entitled proceedings by which he would grant a certificate of public convenience and

necessity to The Superior Oil Company (Superior) authorizing it to render sales of natural gas to Transcontinental Gas Pipe Line Company (Transco). Superior would produce the gas from leases which are in the area offshore from Vermilion Parish in the State of Louisiana. The initial price for the proposed sale is 21.4 cents per Mcf, without tax reimbursements. The examiner would also authorize Transco to construct and operate facilities estimated to cost $2,135,000, to receive the gas purchased from Superior.[1]

Exceptions to the examiner's decision were filed only by United Gas Improvement Company (UGI), a distributing company customer of Transco, which sells gas in Philadelphia and vicinity. UGI requests that final action on the applications in this case be withheld until decision is reached by the Supreme Court in *Atlantic Refining Co.* v. *Public Service Commission of the State of New York* (the *Catco* case), and by the Court of Appeals for the Third Circuit in *United Gas Improvement Co.* v. *F.P.C.*, taking the position that here as there the facts do not support the initial price proposed, and that Superior's sales proposed herein should be treated in the same manner that the sales in the Court cases cited are required or permitted to be treated.

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Decisions have now been handed down in the *Catco* case, 79 Sup Ct. 1246 (June 22, 1959), and the *United Gas Improvement Company* case, Nos. 12797 and 12805 (CA 3, August 4, 1959), —— F. 2d ——.

[1] Subsequent to the examiner's decision, on June 22, 1959, Superior filed with the Commission a motion requesting that final decision be reached in this case as expeditiously as reasonably possible, since unless construction of offshore underwater pipelines is commenced in the near future, inclement weather would probably prevent the accomplishment thereof until next summer, resulting in a delay in making this gas available to Transco and its customers and in the denial of income therefrom to Superior for a year.

We conclude, as more fully appears below, that with certain modifications the presiding examiner's initial decision should be adopted and the exceptions thereto denied.

Our understanding of the requirements of the Supreme Court's *Catco* opinion we stated in our Opinion No. 325 and accompanying order issued August 7, 1959, in *Matters of South Georgia Natural Gas Company,* Docket Nos. G-9892, *et al.* See also our opinions in the *Texas Gas Transmission Corporation* case, G-17335, *et al.*, and the *Transwestern Pipeline Company* case, G-14871, *et al.* Summarizing briefly, under the *Catco* case the producer's proposed initial price must be supported by substantial evidence establishing that the price is required by the public convenience and necessity and is in the public interest; and that although the Commission should consider all the factors, price is an element of prime importance which the Commission should scrutinize closely with a view to protecting the consumer. The Court further indicated what evidence might or should appropriately be adduced to support the proposed price, and what circumstances justified the attachment of an initial price condition. Such evidence includes evidence of whether the proposed price is "out of line"; whether it would result in triggering of general price rises or an increase in the applicant's existing rates by reason of 'favored nation' clauses or otherwise; evidence of comparisons with the existing cost of gas to the purchaser; evidence of whether the proposed producer price would lead to an increase in the rates of the purchaser; evidence of a public need for the gas; and evidence respecting the other matters discussed by the Court in its opinion.

In addition, it appears from the Court's opinion that producer certificate proceedings need not necessarily assume the character of rate proceedings under Section 4 or 5 of the Act, the Court stating at 79 Sup. Ct., p. 1255, that "Section 7 procedures in such situations [involving the attachment of price conditions] thus act to hold the line

awaiting adjudication of a just and reasonable rate." Finally, it seems clear from the opinion that if a record sustaining the proposed initial price is not made, the certificate must be denied or conditioned, as the facts require, and that therefore it is the applicant which at least runs the risk of failing to substantiate the proposed price.

In applying the *Catco* opinion, the Third Circuit Court of Appeals in the *United Gas Improvement Company* case cited above upheld our opinion certificating producer sales without price conditions, concluding that on the facts there before it, the Commission did not err in the balancing of the weight it accorded the various factors of public convenience and necessity.

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Turning to the facts of this record, we conclude that the requirement laid down by the Supreme Court in its *Catco* opinion have been met in this case. In our opinion, the evidence in the record before us substantially establishes that the proposed initial price for Superior's sale is in the public interest, and the proposed sales required by the public convenience and necessity. To us, it is clear that there is no warrant or justification for the attachment of any initial price condition in this case.

Considering whether the price is "out of line" under *Catco,* the facts support the conclusion that Superior's proposed price is not out of line on a comparative basis. The price Transco is to pay for this gas is the same as that it is obligated to pay adjoining offshore operators. Also, the proposed price is less than Transco is now paying other suppliers for gas from onshore fields a short distance away in southern Louisiana.[2] In addition, the proposed price is

[2] An earlier proposal made by Transco involving a lesser price was not accepted. Also, Transco was requested to insert in the contract a favored nation and price redetermination clause but refused.

less than other pipelines such as Trunkline Gas Company in an offshore purchase, and United Fuel Company and Southern Natural Gas Company in southern Louisiana, are paying.

As to the possibility of triggering referred to in *Catco*, this price will not trigger any favored-nation clause in Transco's south Louisiana contracts since it is not within the geographic area specified by such clauses; and it will not affect in any way Transco's existing contracts anywhere. Of course, this price will not result in other pipeliens paying higher prices for gas when they are already paying either the same price or more.

As to the effect of this price on Transco's rates, as indicated in the examiner's decision, Transco has already acquired under Commission authorizations over two-thirds of the gas in the two offshore fields in issue here at the same initial price proposed herein. This price has already been found to be required by the public convenience and necessity, a conclusion found reasonable by the Court in the *United Gas Improvement* case. In our judgment the effects of such increase in Transco's rates as may result from the authorization of the sale proposed herein is outweighed by the benefits of these sales.

Among those benefits is the gas supply which would be added to Transco's system, the extent of which is fully described in the examiner's decision. The bulk of Superior's reserves are located in the Block 76 field, and Superior owns approximately 30 percent of the dedicated reserves in that field. By its acquisition of the reserves in the Block 76 field, Transco has been able to acquire what in the opinion of the company is probably the largest single reserve ever contracted by Transco since it commenced operations. Testimony was that Transco was fortunate to get

it, since Superior's reserve alone was large enough to attract other purchasers, one of which was offering a higher price.

Further in this connection, the record establishes that Transco needs the gas and that the public will benefit from the company's acquisition of this additional supply. This gas would be included as a part of Transco's overall supply, and will help meet the continuing demands on its system. The facts disclose that southern Louisiana is the only area in which Transco has been able to acquire substantial volumes of uncommitted reserves during the past two years. It has sought unsuccessfully to acquire additional reserves at an initial price of 17 cents, and is obliged, if it is to continue to meet the customer requirements it has undertaken to meet, to pay producers in southern Louisiana a price which will induce them to sell the gas.

The demands of Transco's customers and of the markets it serves also support the authorization of this sale. The gas reserves involved in this case will be used to assist Transco to meet its market obligations during the 1959-1960 winter heating season as well as the increased requirements of next winter. The public convenience and necessity obviously will be served by making this gas available to help supply the allocations of natural gas which the Commission has already authorized Transco to serve. Looking at the matter from another point of view, Transco currently uses approximately one-half trillion cubic feet of natural gas per year. The Superior reserves will meet Transco's system supply for about sixth months, thereby assisting the company to maintain the inventory of its system gas supply in the face of heavy annual depletion and ever-increasing annual demands by Transco's customers.

Transco is mindful of the importance of continuing to secure supplies of gas, as this record shows. Transco's

witness testified that whenever it was possible for his company to augment its general gas supply by such a large reserve in an area where it was already certificated and on terms substantially identical with the supply contracts of previous certifications, it was to the benefit of the company to do so. Our knowledge of Transco's system and the large and growing demands of its customers convinces us that this is so.[3]

In addition, the facts disclose that the gas sales contract between Superior and Transco was consummated only after arm's-length negotiation, and there is no affiliation or corporate control between the two, although this fact of itself is not sufficient to sustain the proposed price.

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We conclude that the producer sale proposed herein is substantially supported by the evidence of record and should be certificated at the price proposed, without the attachment of any price condition. The presiding examiner's initial decision should be modified to the extent inconsistent herewith, and as modified should be adopted by the Commission.

The Commission further finds:

All material exceptions, arguments and objections not discussed herein have been considered but are without substantial support in the record or a reasonable basis in law and should be denied. Except to the extent granted herein, exceptions of UGI should be denied. The presiding examiner's initial decision issued herein on February 19,

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[3] This opinion may be shared by others most directly affected by the proposal and in a position to judge where their interests lie, namely, Transco's customers. This case started out as an uncontested proceeding under the Commission's Regulations and UGI is the only customer company which excepted to the examiner's decision.

Staff counsel did not file a brief or exceptions to the examiner's decision.

1959, should, except to the extent modfied by this order, be adopted by the Commission as of the date of issuance of this order, to constitute with this order its decision in these proceedings.

The Commission orders:

(A) The initial decision of the presiding examiner issued herein on February 19, 1959, except to the extent modified by this order, is hereby adopted by the Commission as of the date of issuance of this order, to constitute with this order its decision in these proceedings.

(B) The exceptions filed by UGI to the aforesaid initial decision are, except to the extent granted by this order, hereby denied.

By the Commission.

J. H. GUTRIDE
Joseph H. Gutride,
Secretary.

C2333

Gas Purchase Contract

This Contract, made and entered into as of the 14th day of November, 1958, by and between Hope Natural Gas Company, a West Virginia corporation, herein referred to as "Buyer", and J. Ray McDermott & Co., Inc., a Delaware corporation, Kerr-McGee Oil Industies, Inc., a Delaware corporation, and Phillips Petroleum Company, a Delaware corporation, herein referred to collectively and in the singular as "Seller";

WITNESSETH:

WHEREAS, Seller represents that it owns and/or controls certain valid interests in subsisting oil and gas leases in the West Cameron Area (Offshore), Louisiana, which are

productive of natural gas and which lands and leases are more fully described in Exhibit "A" attached hereto and made a part hereof; and,

WHEREAS, Buyer desires to acquire a supply of natural gas for use in its Appalachian markets; and

WHEREAS, Seller desires to sell natural gas to Buyer in the amounts and upon the terms and conditions herein set forth and, subject to the terms and conditions hereof, represents that Seller can and will so deliver natural gas to Buyer;

NOW, THEREFORE, in consideration of the premises and

mutual covenants herein contained, the parties hereto do covenant and agree as follows:

ARTICLE I

Definitions

The following terms shall respectively have the meaning set forth below:

(a) The term "Seller" and the term "Buyer" shall have the meaning set forth above;

(b) The term "Transporter" shall mean the pipeline company or companies which transport the gas to be delivered to Buyer under this contract from the points of delivery described in Article VII hereof to Buyer's or Buyer's affiliates' pipeline system;

(c) The term "gas" shall mean all natural gas produced from wells classified as gas wells, associated gas wells, gas-condensate wells, and/or oil wells by the Department of Conservation of the State of Louisiana, and the residue gas resulting from processing such gas.

(d) The term "Contract Year" shall mean each period of twelve (12) consecutive calendar months during the term hereof, the first contract year commencing with the first day of the calendar month following that in which first deliveries of gas are made to Buyer or Transporter at any point of delivery hereunder or commencing with the

first day of the calendar month for which payments for gas are made under Article IV, whichever is earlier;

(e) The term "Contract Quantity" shall mean a daily quantity of gas determined as provided in Section 4 of Article IV;

(f) The term "Annual Minimum Quantity" shall mean a quantity of gas in each Contract Year equal to seventy percent (70%) of the Contract Quantity multiplied by the number of days in such year;

(g) The term "cubic foot", when used in relation to a quantity of gas shall refer to a volume determined in accordance with the provisions of Exhibit "B" attached hereto and made a part hereof, and the term "Mcf" shall refer to one thousand (1000) cubic feet;

(h) The term "reserves" shall mean the economically recoverable gas reserves determined or redetermined by the parties hereto as hereinafter provided to be recoverable from those sands or horizons dedicated hereto which are productive of gas as indicated by well completions, conventional cores with analysis, or satisfactory drill stem tests.

Article II

Dedication of Gas

1. Subject to the other provisions hereof, Seller hereby dedicates to the performance of this contract all its interest

and leasehold estate in all gas located in all producing horizons in, under, and

produced from the lands and leasehold estates which are now or may hereafter be owned and under the control of Seller and which may, during the term of this agreement, be discovered, developed purchased or otherwise obtained by Seller underlying the lease or leases described in Exhibit "A", excluding, however:

(a) those sands or horizons or portions thereof which underlie such leases at depths less than 10,000 feet below sea level, and,

(b) those sands or horizons which underlie such leases and which are situated stratigraphically below the base of the sand, the top of which is identified at 14,552 feet on the electric log of Seller's B-1 well in the Block 33 Field, West Cameron Area (Offshore), Louisiana, and

(c) those sands or horizons discovered on the upthrown side of the major fault (excluding any radial faults to the south), which serves as a limiting boundary to the north of the reserves proven in Seller's A-1 and B-1 wells, block 33 Field, West Cameron Area, Louisiana. Seller agrees to promptly inform Buyer as to any changes in the productive status or ownership thereof which are material to this contract.

2. Any other provision of this contract to the contrary notwithstanding, Seller hereby expressly reserves unto Seller, and Seller's successors and assigns, the following rights, together with sufficient gas to satisfy such rights:

(a) To deliver to lessors of any of the leases included

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in the lands and leaseholds described in Exhibit "A" sufficient gas to meet the requirements of lessee's obligations under such leases to furnish gas to such lessors.

(b) To use from said lands and leasehold estates all such gas as Seller may need or require for development and operation of Seller's leases described on Exhibit "A" hereof, including but not limited to the use of gas for fuel, drilling, developing and operating said leases for the production of oil, gas or other minerals.

(c) To use gas from said lands and leasehold estates to drill on adjoining leases which are owned or controlled by Seller but only until the first commercial gas completion is made on such adjoining leases.

(d) To operate the properties covered by this contract free from any and all control by Buyer, in such manner as the Seller in its sole discretion, deems advisable, including without limitation the right to drill new wells, to repair or rework old wells, to renew in whole or in part, the lands and leaseholds covered by this contract and to abandon any well or surrender, release or terminate any lease in whole or in part not deemed by Seller capable under normal methods of operation of producing gas in commercial quantities.

(e) To unitize any of Seller's leases with other properties

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of Seller and of others in the same field, in which event this contract shall extend and apply to the interest of Seller in the newly formed unit to the extent that such interest is derived from the existing leases described in Exhibit "A".

(f) To process, or to cause the processing of, all gas covered hereby prior to its delivery hereunder for the

extraction of ethane, propane, butanes, pentanes and heavier hydrocarbons (together with so much methane as is necessarily removed in the employment of customary processes for the extraction of all such components), reserving to Seller and to those claiming under Seller otherwise than through this agreement all right, title and interest to all such components free of any claim by Buyer hereunder; Seller agrees, however, that the determined total heating value of the gas delivered hereunder shall not be reduced by such processing to less than one thousand (1000) British thermal units per cubic foot; that such gas shall not be subjected to any treatment in such extraction process which will change the chemical composition of the methane delivered hereunder nor shall such extraction process permit or cause the admission of oxygen, or dilute the gas, or render the gas incapable of meeting the quality specifications set forth in Exhibit "B". Seller shall have the right to use such gas as it may require for fuel and shrinkage in the performance of such processing.

ARTICLE III

Construction of Facilities

1. (a) Subject to the provisions of Article IX hereof, Buyer agrees to proceed with due diligence to construct or cause to be constructed such pipeline, measurement, and appurtenant facilities as may be required to enable Buyer to receive, at the point or points of delivery hereinafter referred to, the gas contemplated by this contract, and to have such facilities tested and ready for operation not later than September 1, 1959.

(b) Subject to the provisions of Article IX hereof, Seller agrees to proceed with due diligence to construct or cause to be constructed, or arrange for the use of, such gas

gathering and treating facilities as may be required to enable Seller to deliver, at the point or points of delivery hereinafter referred to, the gas contemplated by this contract and to have such facilities tested and ready for operation at the time Buyer's facilities are completed and tested as specified in Section 1(a) above, but not later than September 1, 1959.

ARTICLE IV

Quantity of Gas

1. Subject to the other provisions hereof, Seller agrees, upon each day of the term hereof, to sell and deliver to Buyer such quantity of gas as Buyer shall request; provided, however, that the amount so delivered shall not exceed on any such day (i) the quantity

of gas which Seller may legally produce in conformity with the proration rules and regulations of the Department of Conservation of the State of Louisiana or of any other governmental authority which may in the future have jurisdiction in the premises, or (ii) one hundred twenty-five percent (125%) of the Contract Quantity; provided, however, that Seller shall never be required to produce any well or wells in excess of the maximum volume of gas that can be produced hereunder from the wells or reservoirs in a manner that constitutes good operating practice and, in Seller's opinion, will neither cause waste of oil and/or gas nor cause physical damage to such wells or reservoirs.

2. Buyer agrees to make appropriate nominations of sufficient volume to cover the quantities of gas to be purchased in accordance with the provisions hereof.

3. Subject to the other provisions hereof, Buyer agrees to purchase and receive from Seller, on as nearly a uni-

form daily and hourly basis as the operation of Buyer's pipeline system will permit, a quantity of gas on each day which will average in each Contract Year not less than the Annual Minimum Quantity. Should Buyer fail in any Contract Year to receive the Annual Minimum Quantity, Buyer shall, within sixty (60) days after the close of the Contract Year, pay to Seller the aggregate amount which Seller would have received had such deficiency in Annual Minimum Quantity been purchased at the price in effect for such Contract Year (which shall be the weighted average price, if a price change occurs during such Contract Year), provided, however, that if, on one or more days during such Contract Year, Seller

shall have failed, whether or not by reason of force majeure, to deliver to Buyer the full Contract Quantity upon the request of Buyer, then the aggregate amount of such deficiencies in Seller's deliveries shall be applied in reduction of the deficiency for which Buyer shall be obligated to pay under the foregoing provision. Such payment having been made, Buyer shall have the right, exercisable only during the next succeeding Contract Year, to take "make-up gas" upon the terms and conditions set forth in Section 8 of this Article IV.

4. The Contract Quantity shall be a daily quantity of gas equal to the quotient of the reserves estimated as of September 1, 1959, (such determination to be concluded within sixty (60) days thereafter and shall be based upon all applicable data available as of September 1, 1959), divided by five thousand, one hundred fifty (5150) subject to adjustment as provided for in this Article IV, provided, however, that such Contract Quantity shall not exceed eighty million (80,000,000) cubic feet per day unless Buyer shall specifically agree thereto.

If, at any determination or redetermination, the reserves shall be determined to exceed that volume of gas necessary to support a Contract Quantity of eighty million (80,000,000) cubic feet per day in accordance with the formula provided in Section 5 of this Article IV, then the excess volume will be considered "Excess Reserves" which will be subject to the conditions hereinafter set forth. With respect to such

Excess Reserves, Buyer shall have a period of twelve (12) calendar months following the reserve determination or redetermination within which to increase the Contract Quantity to the quantity determined in accordance with Section 5 of this Article IV or release such Excess Reserves from the terms of this contract. During such period Buyer will endeavor, with due diligence, to take such steps as are necessary to enable it to increase the Contract Quantity or will give written notice to Seller of its intention to release such Excess Reserves as soon as possible after such determination or redetermination has been made but not later than six (6) months following the date of such determination. If Buyer elects to release the Excess Reserves hereinabove described, Seller may sell to others or otherwise dispose of such Excess Reserves or any portion thereof.

However, for the purpose of taking gas during the first five (5) contract years, the Contract Quantity shall be a daily quantity of gas equal to the quotient of the reserves, as determined or redetermined, divided by forty-five hundred and fifty (4550) subject to adjustment as provided for in this Article IV.

5. After commencement of delivery of gas hereunder, either Buyer or Seller may, by written request made not more often than once each calendar year, cause a redetermination to be made within sixty (60) days after such

request, of the reserves available for delivery under this contract, as of the date of such redetermination.

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Upon each redetermination, the reserves subject to this contract shall be the sum of (i) the reserves redetermined in accordance with the preceding paragraph in this Section 5, and (ii) the quantity of gas delivered hereunder from the date of first delivery until such redetermination date; and the Contract Quantity shall be adjusted, as of such redetermination date, to an amount equal to 1/5150th (except during the first five (5) years when the factor will be 1/4550th) of the reserve figure developed under the foregoing provision of each such redetermination and the Annual Minimum Quantity shall be adjusted as of such redetermination date as provided herein.

6. Should the then existing wells on the lands and leaseholds described in Exhibit "A" be incapable, under normal methods of operation, of producing from the dedicated reserves upon request of Buyer during any Contract Year, the Contract Quantity of gas which Seller is obligated to deliver hereunder, then the Contract Quantity which Seller is obligated to deliver may upon six (6) months' written notice to Seller by Buyer be reduced to the quantity of gas which such wells are capable of producing from the dedicated reserves under normal methods of operation, and the Annual Minimum Quantity which Buyer is obligated to purchase and receive hereunder shall be reduced accordingly, provided, however, that Seller may nullify said notice, by completing during the six (6) months' period following notice by Buyer, corrective measures to increase the deliverability of the wells or completing new wells so that Seller can deliver the

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Contract Quantity stipulated in this contract. In the event Seller does not complete corrective measures to increase the deliverability within the six (6) month period following notice by Buyer, as provided in this Section, then the Contract Quantity and Annual Minimum Quantity will be reduced as provided in this Section 6.

7. Buyer shall during each full calendar month take and pay for a volume of gas equal to thirty-five percent (35%) multiplied by the number of days in the applicable calendar month, further multiplied by the then effective Contract Quantity.

8. If Buyer shall fail to take delivery during any Contract Year of the Annual Minimum Quantity in effect during such year, then the payment referred to in Section 3 of this Article IV having been made, all gas delivered hereunder in each month of the succeeding Contract Year in excess of the 1/12th of the Annual Minimum Quantity then in effect, but subject to Section 10 of this Article IV, shall be treated as "make-up gas", which Buyer shall be entitled to take free of cost and which shall be excluded in determining the quantity of gas taken by Buyer in fulfillment of its obligation hereunder for such succeeding Contract Year, until the volume of all "make-up gas" so delivered during such succeeding Contract Year shall have aggregated the full volume paid for by Buyer under Section 3 of this Article IV; provided, however, during any month when any part of such "make-up gas" is taken, Buyer

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shall pay to Seller the differential, if any, in price between that at which payment was made for a deficiency in takes and that in effect at the time such "make-up gas" is taken.

9. Subject to the provisions of Article IX hereof, force majeure notwithstanding, if Seller is ready and able to deliver to Buyer the Contract Quantity of gas by September 1, 1959, then if Buyer fails to commence, on or before September 1, 1959, the receipt of gas, Buyer will pay each month until deliveries commence hereunder for a minimum amount of gas equal to 1/12th of the Annual Minimum Quantity, provided that Buyer shall be entitled to make up such quantities so paid for in accordance with Section 8 of this Article. Notwithstanding anything herein to the contrary, Seller may terminate this contract if deliveries have not commenced on or before January 1, 1960 by giving written notice to Buyer on or before February 1, 1960.

10. On any one or more days during the term of this contract, Seller shall, upon Buyer's request, deliver to Buyer volumes of gas up to one hundred twenty-five percent (125%) of the Contract Quantity, if such volumes in Seller's opinion are available for delivery from the dedicated properties; provided, however, that volumes of gas taken in excess of the Contract Quantity on such day or days shall not be treated as make-up gas.

11. Seller agrees to furnish Buyer, upon request, after release to the public, all surface maps, well logs, flow and pressure tests, casing programs, gas analyses, and other pertinent information respecting gas reserves, gas quality and well deliverability of the dedicated lands and leaseholds. Seller agrees, upon request of Buyer, but not more often than once each calendar year, to test its wells at the surface to determine potentials and pressures.

12. All determinations and redeterminations of the quantity of reserves for the purpose of this agreement shall be made by the agreement of Buyer and Seller, or in the

absence of such agreement, by arbitration under the provisions of Exhibit "B".

13. Subject to the ability of Seller's wells to produce such quantities, Buyer agrees to take hereunder a sufficient volume of gas to enable Seller to maintain withdrawals from Seller's reserves, in each separate reservoir, ratably with withdrawals being made and delivered to Buyer from reserves owned by others in such rservoir.

Notwithstanding the provisions of this Article IV, if at any time during the term hereof, the quantities of gas purchased and received by Buyer hereunder are insufficient to protect Seller's reserves from inequitable withdrawals caused by others producing gas from common reservoirs from which deliveries are then being made hereunder, Buyer agrees, upon receipt of notice from Seller that such situation exists,

to cooperate with Seller by using all available remedies to thereafter insure the equitable withdrawals of gas from Seller's reserves. The provisions of this paragraph shall not be construed, however, as reducing Buyer's purchase obligation hereunder.

14. In the event the daily quantity of gas deliverable hereunder by Seller to Buyer is two million (2,000,000) cubic feet, or less, Buyer shall have the right to notify Seller of such fact, and Seller shall have a period of ninety (90) days within which to increase the daily quantity of gas deliverable hereunder. If Seller fails to increase the volume of gas deliverable hereunder within said period, then Buyer shall have the right to terminate this contract on thirty (30) days' written notice to Seller to be given within ten (10) days after the expiration of such ninety (90) day period.

(C2347)

ARTICLE V

Pressure

The gas to be delivered hereunder shall be delivered by Seller at the points of delivery at the pressure which Buyer shall from time to time specify which shall not be a pressure in excess of one thousand two hundred (1200) pounds per square inch gauge. If the natural pressure of any of Seller's wells shall become insufficient to deliver gas hereunder at the pressure which Buyer shall from time to time specify, either Seller or Buyer shall have the right, but shall be under no obligation,

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at its own expense to compress or make arrangements to compress such gas to the pressure specified from time to time. In the event that neither elects to compress such gas within ninety (90) days from the time the pressure thereof has become insufficient, the gas not so compressed shall be released from the dedication under this contract on thirty (30) days' written notice from either party.

ARTICLE VI

Term of Contract

This agreement shall be effective from the date hereof and shall continue and remain in full force and effect for a primary term of twenty (20) years from the first day of the first month following the date upon which Seller commences the delivery of gas to Buyer hereunder and shall continue from year to year thereafter. Either party may terminate this contract at the expiration of the primary term or at the end of any Cotnract Year thereafter by giving the other party six (6) months' advance written notice.

ARTICLE VII

Points of Delivery

1. The points of delivery for all gas delivered hereunder shall be at each of Seller's production platforms on the leases hereunder.

2. Seller, to the extent it may lawfully do so under the terms

of its lease or leases, hereby agrees to grant to Buyer reasonable space on each of its platforms to install the necessary measuring equipment, regulating equipment, and other necessary facilities contemplated hereby to accept delivery of gas hereunder, and further agrees to grant to Seller necessary easements, together with rights of ingress and egress to and from said facilities, to construct, operate, maintain, repair, and remove said facilities.

3. As between the parties hereto, Seller shall be in control and possession of the gas deliverable hereunder and responsible for any damage or injury caused thereby until the same shall have been delivered to Buyer at the points of delivery hereunder, after which delivery Buyer shall be deemed to be in exclusive control and possession thereof and responsible for any injury or damage caused thereby.

ARTICLE VIII

Prices

1. The price to be paid by Buyer to Seller for gas delivered by Seller to Buyer hereunder, or for which Buyer is obligated to pay for, whether taken or not, shall be as follows:

(C2349)

A. For the four (4) year period from the date of first delivery hereunder or from September 1, 1959, whichever first occurs.....21.5¢ per 1000 cu. ft.

B. For the next four (4) year period 22.5¢ per 1000 cu. ft.

C. For the next four (4) year period 23.5¢ per 1000 cu. ft.

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D. For the next four (4) year period 24.5¢ per 1000 cu. ft.

E. For all gas purchased thereafter 25.5¢ per 1000 cu. ft.

2. (a) Any sales, transaction, occupation, service, production, severance, gathering, transmission, export or excise tax, assessment or fee hereafter levied, assessed or fixed by the United States or any state or other governmental authority and taxes of a similar nature or equivalent in effect (not including income, excess profits, capital stock, franchise, or general property taxes) in respect of or applicable to the gas to be sold by Seller to Buyer hereunder and which Seller may be liable for during any month, either directly or indirectly through any obligation to reimburse others, are hereinafter collectively referred to as "Seller's tax."

(b) Buyer agrees to pay or reimburse Seller for "Seller's tax" up to and including the sum of two and five hundredths cents (2.05¢) per Mcf at the pressure base at which such tax may be computed.

(c) In the event "Seller's tax" shall exceed two and three-tenths cents (2.3¢) per Mcf, Buyer shall pay to Seller each month, so long as such tax shall be in effect, an amount, in addition to that provided for in paragraph 2(b) of this Article VIII, sufficient to reimburse Seller for: (i) Three-fourths (¾) of "Seller's tax" which is in excess of two and three-tenths (2.3¢) per Mcf but is less than four

and three-tenths cents (4.3¢) per Mcf, and (ii) one-half (½) of Seller's tax which is in

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excess of four and three-tenths cents (4.3¢) per Mcf.

(d) In the event all or any part of such liability of Seller is not determined or determinable by the end of any month, then such additional amount per Mcf required in respect to such liability not determined or determinable shall be set forth for all such months in any calendar year in a statement to be rendered by Seller to Buyer by April 1 of the following year, and Buyer shall pay the amount due pursuant to such statement on or before May 1 of such following year.

(e) Provided that, in the event any tax or additional tax or any part thereof, which Buyer has paid or contributed to, pursuant to the provisions of Section 2 of this Article VIII, shall be declared to be unconstitutional, and if such tax or additional tax is recovered by the Seller, then Seller shall refund to Buyer its pro rata share of the amount thereof theretofore so paid or reimbursed to Seller by Buyer.

(f) Buyer shall also reimburse Seller, on the same basis as set forth in this Section 2, for any payments made by Seller subsequent to the date hereof of any sums due the Federal Government on the gas delivered to Buyer pursuant to this agreement as additional royalty, or as otherwise denominated, under Section 6(a)(9) of the Outer Continental Shelf Lands Act, 67 Stat. 462 et al, or other valid Federal law, in lieu of any of the taxes specified in this Section 2.

3. Seller may request a price determination for each of the

periods designated as Sections 1 C, 1 D and 1 E in this Article VIII by giving written notice to Buyer not less than nine (9) months nor more than twelve (12) months prior to the beginning of the period for which redetermination is to be made and concluded by the parties not less than three (3) months prior to the beginning of such period, or, if they are unable to agree, by a board of arbitrators as hereinafter provided. Upon such request, the parties, or the arbitrators, shall determine the three (3) highest contract prices agreed under such contracts to be paid at the beginning of such period by any three (3) different operating interstate purchasers of natural gas (not excluding Buyer) for gas produced in Cameron Parish, Louisiana, and in that portion of East and West Cameron Areas Offshore, Louisiana, North of 29° Latitude, under contracts with producers, under which deliveries of gas are being made at the time of agreement or arbitration, providing for deliveries of gas for an initial term of not less than twenty (20) years, and upon substantially similar terms of measurement, quantity, quality and delivery provided herein, and the price to be paid during such period shall be the average of such three (3) highest prices per Mcf, provided, however, that in no event shall the price per Mcf hereunder be less, during the respective periods, than the price shown in Sections 1 and 2 of Article VIII for such periods. For the purposes of this Section, "price" shall be deemed to include tax reimbursement.

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ARTICLE IX

Conditions, Governmental Authorizations and Regulatory Bodies

1. Within sixty (60) days after the date hereof, each party hereto shall file with the Federal Power Commission (herein called the "Commission") appropriate applications for certificates of public convenience and necessity (herein called "certificates") necessary to the commencement of the deliveries contemplated by this contract and thereafter will use due diligence and prosecute such applications to final decision, order or approval, including without limitation at each party's discretion prosecution by way of court appeal, to obtain the necessary governmental authorizations to sell and purchase the gas deliverable hereunder in accordance with the provisions hereof.

2. Notwithstanding the provisions of Article IV of Exhibit "B" hereof, in the event either party does not obtain a final and non-appealable certificate from the Commission on or before April 1, 1959, which is satisfactory to the party applying for same, then either party may, at its option, thereafter and prior to the obtaining of such final and non-appealable certificate or certificates, terminate this contract by written notice to the other party.

3. Within thirty (30) days after the issuance of a certificate to either party, such party shall notify the other party in writing

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whether the terms and conditions of the certificate or certificates issued to it are satisfactory. If either Buyer or Seller shall so notify the other party that such terms and

conditions are not satisfactory, either party may terminate this contract by giving written notice to the other party.

4. Each party hereto shall submit copies of its filings or amendment to such filings made with the Commission to the other party and shall keep the other party advised of any action taken by the Commission with respect thereto, and shall further afford the other party such reasonable assistance in the prosecution of its applications as the other may request.

5. If this contract is terminated under the provisions of this Article IX, neither party shall be under any obligation or liable for any damages to the other party by reason hereof, and the respective obligations of the parties to sell and purchase gas hereunder shall be of no force and effect from and after the date of such termination.

6. This contract shall be subject to all valid applicable state and federal laws, rules and regulations. All such laws, rules and regulations shall be presumed by both parties to be valid unless and until such laws, rules or regulations shall be declared invalid by final judgment in a court of competent jurisdiction.

7. Buyer and Seller agree that Seller may make any necessary application or filing with any federal or state regulatory body to

receive the applicable prices specified to be paid by Buyer to Seller in Article VIII hereof, and, in that connection, Buyer hereby consents to any application or filing which Seller may be required to make with any federal or state regulatory body in order to establish the applicable prices set forth in Article VIII hereof as the effective price hereunder.

Article X

Miscellaneous

1. No waiver by either party of any one or more defaults by the other party in the performance of this contract shall operate or be construed as a waiver of any future default or defaults, whether of a like or a different character.

2. (a) Any payment, notice, request, demand, statement or bill provided for in this contract shall be in writing and shall be directed to the post office address of each of the parties hereto, as the case may be, as follows:

Buyer:

Hope Natural Gas Company
P. O. Box 1951
Clarksburg, West Virginia

Seller:

J. Ray McDermott & Co., Inc.
14th Floor, Houston Club Building
Houston, Texas
Phillips Petroleum Company
Attention: Natural Gas Department
Bartlesville, Oklahoma
Kerr-McGee Oil Industries, Inc.
Kerr-McGee Building
Oklahoma City 2, Oklahoma

or at such other address as either party shall from time to time designate for the purpose by a registered or certified letter addressed to the other party.

(b) Notwithstanding any other actual or constructive knowledge of or notice to Buyer, no change or division in

ownership in this contract by Seller shall be binding upon Buyer for any purpose until Buyer receives, at the place specified above, certified copies of the instrument or instruments, or other legally authenticated written evidence, constituting or accomplishing the change in ownership from the party acquiring the interest or right in this contract or from Seller.

(c) The parties seller to this contract appoint J. Ray McDermott & Co. Inc. to serve as their representative hereunder for giving and receiving notices and requests, pertaining to matters hereinafter mentioned in this paragraph 2(c), necessary for making and witnessing tests, dispatching of gas, delivering the quantities of gas deliverable, and receiving payments therefor, allocating, prorating, and distributing such payments among the various parties seller and, further, Buyer may act, and shall be fully protected in acting, in reliance upon the above described acts and things done or performed by such representative in behalf of the parties seller as fully and effectively as though each had done, performed or made the same. Each of the parties seller may change its representative and designate one of their number as the new representative from time to time by delivery of written notice of change and

designation to Buyer. It is understood and agreed that each party Seller executing or ratifying this contract is selling its gas severally, and not jointly with other sellers, to Buyer, that the parties Seller are not acting as partners, joint adventurers or otherwise jointly in this transaction and that nothing herein contained or provided for shall operate to, or be construed as, creating any such relationship.

3. This contract shall not be assigned, in whole or in part, by Buyer without, in each instance, the prior written permission of Seller, except that Buyer may, without first obtaining such written consent of Seller, pledge or mortgage its interests in this contract, or assign the same as security for any loan to it, and Buyer may assign its interests in this contract at any time to any other affiliated company.

All the terms, covenants, and agreements hereof shall run in favor of and be binding upon the parties hereto, and their successors, sublessees and assigns. If any of the leases shown on Exhibit "A" are transferred, assigned or subleased by Seller, such transfer, assignment or sublease shall contain provisions making same especially subject to the provisions of this gas purchase contract.

4. The references to Transporter herein shall not be construed as relieving Buyer of any obligation imposed upon Buyer hereunder; and, as between Seller and Buyer, Transporter shall be the agent for Buyer for gas measurement tests and dispatching.

5. This agreement may be executed in a number of counterparts, each of which shall be considered an original.

6. There is attached hereto Exhibit "B" which is hereby made a part of this contract and contains certain provisions entitled as follows:

I. Quality of Gas

II. Measurements

III. Billing and Payment

IV. Force Majeure

V. Waranty of Title

VI. Arbitration

In Witness Whereof, this instrument is executed as of the date first above written.

HOPE NATURAL GAS COMPANY
By J. J. Schmidt
Vice President

ATTEST:
John M. Byrnside
Assistant Secretary

WITNESSES:

Albert W. Davis
Hayward Rapp

J. RAY MCDERMOTT & CO., INC.
By T. P. Hull, Jr.
Vice President

ATTEST:
M. P. Graham

M. L. Singletary
Mary A. Hillman

C2359

KERR-MCGEE OIL INDUSTRIES, INC.
By F. C. Love
Executive Vice President

ATTEST:
H. H. Raborn
Assistant Secretary

WITNESSES:

John T. Fisher
W. C. Savage
Pat Cook

PHILLIPS PETROLEUM COMPANY
By C. O. Stark
Vice President

ATTEST:
J. F. Kinslow
Assistant Secretary

John Horn
Babe Lea Addington

Signature page to gas purchase contract between Hope Natural Gas Company, as Buyer, and J. Ray McDermott & Co., Inc., et al, as Seller, dated November 14th, 1958.

C2363

EXHIBIT "A"

STATE LEASE No. 1123
FEDERAL LEASE No.: OCS-0265
DATED: July 18, 1947
LESSOR: State Mineral Board for the State of Louisiana
LESSEE: Kerr-McGee Oil Indusries, Inc.
COVERING: Lands in Cameron Parish, Louisiana, described as follows:

Tract 2150 (Block 33), Gulf of Mexico, State of Louisiana, Beginning at a point in the Gulf of Mexico, off the shore of the State of Louisiana, 9,845.868 feet south of and 556.255 feet west of U.S.G.S. Triangulation Station "Berry";
Thence: south 14,758.048 feet;
Thence: west 14,758.048 feet;
Thence: north 14,758.048 feet;
Thence: east 14,758.048 feet to the point of beginning, containing 5,000 acres or less. All bearings based on Louisiana (Lambert) Coordinate System and as shown on plat on file in State Land Office as Block 33.

C3955

BEFORE THE
FEDERAL POWER COMMISSION

Doocket No. G-17337

In the Matter of

J. RAY MCDERMOTT & CO., INC.

Application for a Certificate of Public Convenience and Necessity

Comes now J. Ray McDermott & Co., Inc. (hereinafter referred to as "Applicant") and hereby makes application, pursuant to and in accordance with the Regulations of the Federal Power Commission and Section 7 of the Natural Gas Act for a certificate of public convenience and necessity covering the sale of natural gas as hereinafter described.

By this application, Applicant does not admit that it is a natural gas company or that the sale of gas for which a certificate is here sought is subject to the jurisdiction of the Commission; on the contrary, Applicant contends that it is not a natural gas company and that the sale herein described is not subject to the jurisdiction of the Commission, but Applicant makes this application solely for the purpose of complying with said Regulations of the Commission in order to avoid any penalty which might be incurred by a failure to comply with the provisions thereof or of the Natural Gas Act.

C3956

Applicant specifically reserves the right to pursue any and all remedies which it may have relating to the as-

serted jurisdiction by the Federal Power Commission, and this application is filed without prejudice to such rights.

In support of its application, Applicant respectfully shows as follows:

I.

Description of Applicant

Section 157.24 (a)(1)

The exact legal name of Applicant herein is J. Ray McDermott & Co., Inc., a corporation organized under the laws of the State of Delaware, having its principal place of business in Houston, Texas.

Applicant is authorized to do business in the States of Alabama, Arkansas, California, Colorado, Florida, Illinois, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Montana, Nebraska, North Dakota, South Dakota, Texas, New Mexico, Pennsylvania, Wyoming, Oklahoma, Nevada, Utah and Delaware.

II

Persons on Whom Papers Are to be Served
Section 157.24 (3)

The name, title, and post office address of the person to whom correspondence or communications in regard to this application are to be addressed is:

C3957

T. P. Hull, Jr., Vice President
J. Ray McDermott & Co., Inc.
14th Floor, Houston Club Building
Houston 2, Texas

III

Service to be Certificated

Section 157.24 (4)

Applicant proposes to sell natural gas produced by Applicant and others from acreage in the Block 33 Field, West Cameron Area (Offshore), Louisiana. The purchaser of such gas will be the Hope Natural Gas Company. A copy of Applicant's contract with Hope Natural Gas Company is attached hereto as Exhibit A. Applicant has been informed and, therefore, alleges that Hope Natural Gas Company is a natural gas company.

IV

Sources of Gas

Section 157.24 (4)(i)

Gas utilized to render the service proposed herein will be produced from acreage in the Block 33 Field, West Cameron Area (Offshore), Louisiana. None of the gas involved will be purchased from third parties.

The location of the acreage involved herein and the point of delivery to Hope Natural Gas Company are shown on Exhibit B, attached hereto.

V

Routes of Pipelines

Section 157.24 (4)(ii)

The sale proposed herein does not involve the use of pipelines of Applicant.

VI

Communities Served

Section 157.24 (4)(iii)

Applicant proposes to serve no communities, either at wholesale or at retail.

VII

Main Line Industrial Customers

Section 157.24 (4)(iv)

Applicant proposes no sale to main line industrial customers.

VIII

Major Appurtenances

Section 157.24 (4)(v)

The sale proposed herein does not involve the use of any major appurtenance of Applicant subject to the jurisdiction of the Commission.

IX

Exhibits

Section 157.25

Exhibit A—There is attached hereto as Exhibit A a gas purchase contract dated November 14, 1958, covering the purchase by Hope Natural Gas Company from

J. Ray McDermott & Co., Inc., et al., of natural gas in the Block 33 Field, West Cameron Area (Offshore), Louisiana.

Exhibit B—There is attached hereto as Exhibit B a map showing:

(a) the location of the acreage from which gas is produced to render the service proposed herein;

(b) paragraph not applicable, since Applicant proposes no pipelines;

(c) point of delivery of gas to Hope Natural Gas Company;

(d) paragraph not applicable, since no gas is delivered to Applicant;

(e) paragraph not applicable, since no communities are served, either wholesale or retail; and

(f) paragraph not applicable, since no deliveries to main line industrial customers are proposed.

X

Other Information

Section 157.27

Pursuant to the Commission's Order No. 190, Applicant states that it is the Operator of the property described herein and that ownership of such property is as follows:

J. Ray McDermott & Co., Inc.	50%
Phillips Petroleum Company	25%
Kerr-McGee Oil Industries, Inc.	25%

WHEREFORE, J. Ray McDermott & Co., Inc., Applicant herein, respectfully requests:

(1) that the Commission issue to it a certifi-

cate of public convenience and necessity authorizing it to render the service described in this application and to operate those facilities required to render such service which are subject to the jurisdiction of the Commission;

(2) that this application be disposed of in accordance with the shortened procedure provided for in Rule 1.32 of the Commission's Rules of Practice and Procedure, and, in that connection, Applicant requests that the intermedi-

ate decision procedure be omitted and waives oral hearing and the opportunity for filing exceptions to the decision of the Commission; and

(3) such other and further relief as appear warranted in the premises.

Respectfully submitted,

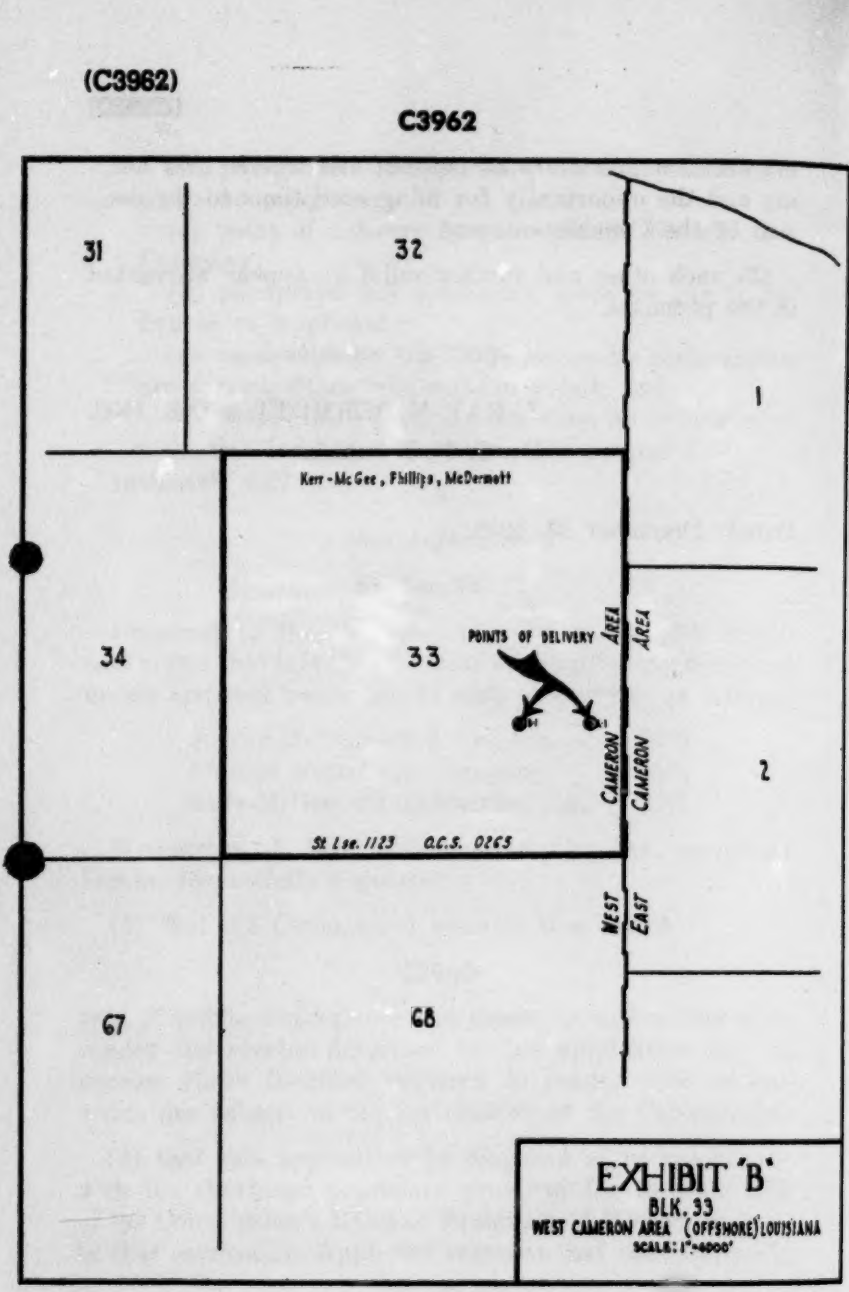
J. RAY McDERMOTT & CO., INC.

By T. P. HULL, JR.

Vice President

Dated: December 23, 1958

(C3962)


C3962
31
32
1
Kerr - McGee, Phillips, McDermott
34
33
POINTS OF DELIVERY
AREA
CAMERON
AREA
CAMERON
2
St. Lse. 1123 O.C.S. 0265
WEST
EAST
67
68
EXHIBIT "B"
BLK. 33
WEST CAMERON AREA (OFFSHORE) LOUISIANA
SCALE: 1"=4000'

C3977

BEFORE THE
FEDERAL POWER COMMISSION

Docket No. G-17340

In the Matter of

CALLERY PROPERTIES, INC., *et al.*

Application for Certificate of Public Convenience and Necessity

Comes now Callery Properties, Inc. ("Applicant") and hereby makes application, pursuant to and in accordance with the Federal Power Commission Regulations under the Natural Gas Act and Section 7 of the Natural Gas Act, as amended, for a Certificate of Public Convenience and Necessity covering the sale of natural gas as hereinafter particularly described.

Applicant specifically reserves the right to pursue any and all remedies which it may have relating to the asserted jurisdiction by the Federal Power Commission and this application is filed without prejudice to such rights.

In support of its application, Applicant respectfully shows as follows:

I

Description of Applicant

The exact legal name of Applicant herein is Callery Properties, Inc., a corporation organized under the laws of the State of Delaware, having its principal place of business in Houston, Texas.

Applicant is authorized to do business in the States of Delaware, Texas, and Louisiana.

C3978

II

Persons on Whom Papers Are to be Served

The name, title and post office address of the person to whom correspondence or communications in regard to this application are to be addressed are:

John W. Martin, Vice-President
Callery Properties, Inc.
400 Bank of the Southwest Building
Houston, Texas

and

May, Shannon & Morley
1700 K Street, N.W.
Washington 6, D. C.

III

Service to be Certificated

Applicant proposes to sell natural gas to Hope Natural Gas Company (Hope), pursuant to that certain contract between Callery Properties, Inc., et al, as Seller, and Hope Natural Gas Company, as Buyer, dated as of December 13, 1958. Applicant is advised and, therefore, alleges that such gas will be transported in interstate commerce, for the account of Hope, through pipelines owned and operated by Texas Gas Transmission Corporation and Texas Eastern Transmission Corporation for delivery into the facilities of, and for resale by, Hope or Hope's affiliates. Applicant is further advised that Texas Gas and Texas Eastern are filing applications concurrently herewith seeking authority to render such transportation service.

C3979

IV

Sources of Gas

All of the gas sold and delivered to Hope Natural Gas Company will be produced from acreage controlled by Applicant in the Bayou Pigeon Field, which is located in Iberia Parish, Louisiana. None of the gas involved will be purchased by Applicant from third parties.

The location of the Bayou Pigeon Field and the point of delivery to Hope Natural Gas Company are shown on Exhibit A, attached hereto.

V

Routes of Pipelines

There are no pipelines of the Applicant subject to the jurisdiction of the Commission over which the sale of natural gas to Hope Natural Gas Company will be accomplished.

VI

Communities Served

Applicant proposes to serve no communities either at wholesale or at retail.

VII

Main Line Industrial Customers

Applicant proposes no sales to "Main Line Industrial Customers".

C3980

VIII

Major Appurtenances

Applicant will not own and operate any major appurtenances in rendering service to Hope Natural Gas Company as described hereinabove.

IX

Ownership

F. A. Callery, Inc. is the Operator of the Property described herein. The ownership of the property under this contract is as follows:

Name	Percentum of Ownership Before Payout *	Percentum of Ownership After Payout *
Jacob Aron	2.00000	1.33333
Edward B. Benjamin	5.00000	3.33334
Norborne Berkeley	2.50000	1.66667
Francis A. Callery	.04984	.07532
George L. Callery	—	.75000
Callery & Jones	2.34171	12.69441
Lammot du Pont Copeland	5.00000	3.33334
Culldale Associates, II	2.00000	1.33333
William D. Dana	3.00000	2.00000
Frederick L. Ehrman	1.24766	1.88562
Estate of John Hancock	1.24766	1.88561
John Fell	1.42373	1.72938
William S. Glazier	1.01272	1.53055
Samuel Goldwyn	5.00000	3.33334
Charles B. Grace	2.00000	1.33333
E. G. Grace	3.00000	2.00000
Monroe Gutman	1.84624	1.73444
William J. Hammerslough	.94687	1.43102
John Hertz	2.53395	2.14030

Name	Percentum of Ownership Before Payout *	After Payout *
Philip Isles	.89525	1.35302
Herman H. Kahn	.67990	1.02754
Arthur Keating	2.50000	1.66666
Edwin L. Kennedy	.40046	.60523
C3981		
Mrs. Miles Kimball	1.00000	.66667
Joseph M. Larkin	1.50000	1.00000
Herbert Lehman	2.00000	1.33333
Robert Lehman	25.34148	26.17396
Marvin Levy	.50000	.33333
Ted Leyhe	1.00000	.66667
Grace R. McMath	1.50000	1.00000
Robert E. McMath	1.50000	1.00000
Frank J. Manheim	.49475	.74779
Paul E. Manheim	.98781	1.49289
Paul M. Mazur	1.54489	2.33483
Morris Natelson	.59446	.89842
A. J. Ostheimer, 3rd	2.25000	1.50000
Courtlandt Otis	1.50000	1.00000
James Sachs	2.25000	1.50000
I. Sack, Personal	—	.50000
Louis J. Sneed, Jr.	5.50000	3.66666
Harold J. Szold	.77423	1.17010
Joseph Thomas	1.88635	2.00624
Edwin L. Weisl	1.25000	.83333
TOTAL	100.00000	100.00000

* The co-owners who provided funds for payment of all property, drilling and completion costs through the first well are entitled to recover such costs out of the net revenues from the production of such well before the carried interests participate in the revenues from the production or bear their share of the cost of operating the well.

X

Exhibits

Exhibit A—Map

There is attached hereto a general map of Applicant's facilities relating to the proposed sale of gas as described hereinabove, showing:

(a) The location of the gas field from which gas will be produced by Applicant;

(b) There are no pipelines, other than gathering lines in Applicant's system, to be utilized in the service hereinabove described;

(c) The point of interconnection where Applicant will deliver gas to Hope Natural Gas Company;

(d) There will be no delivery of gas to Applicant's facilities;

(e) Applicant will not serve any communities at wholesale or at retail;

(f) Applicant will not sell gas to any main line industrial customers.

Exhibit B—Service Contract

The contract between Callery Properties, Inc., et al. and Hope dated December 13, 1958 is contained in Exhibit H to the Application of Texas Gas Transmission Corporation which is being filed concurrently herewith. Such contract is incorporated herein by reference.

WHEREFORE, Applicant respectfully requests:

(1) that the Commission issue to it a Certificate of Public Convenience and Necessity authorizing it to render the

service described in this application and to operate those facilities required to render the services which are subject to the jurisdiction of the Commission; and

(2) that this application be disposed of in accordance with the shortened procedure provided for in Rule 1.32 of the Commission's Rules of Practice and Procedure, and, in that connection, Applicant requests that the intermediate decision procedure be omitted and waives oral hearings and opportunity for filing exceptions to the decision of the Commission; and

C3983

(3) such other and further relief as appears warranted in the premises.

Respectfully submitted,

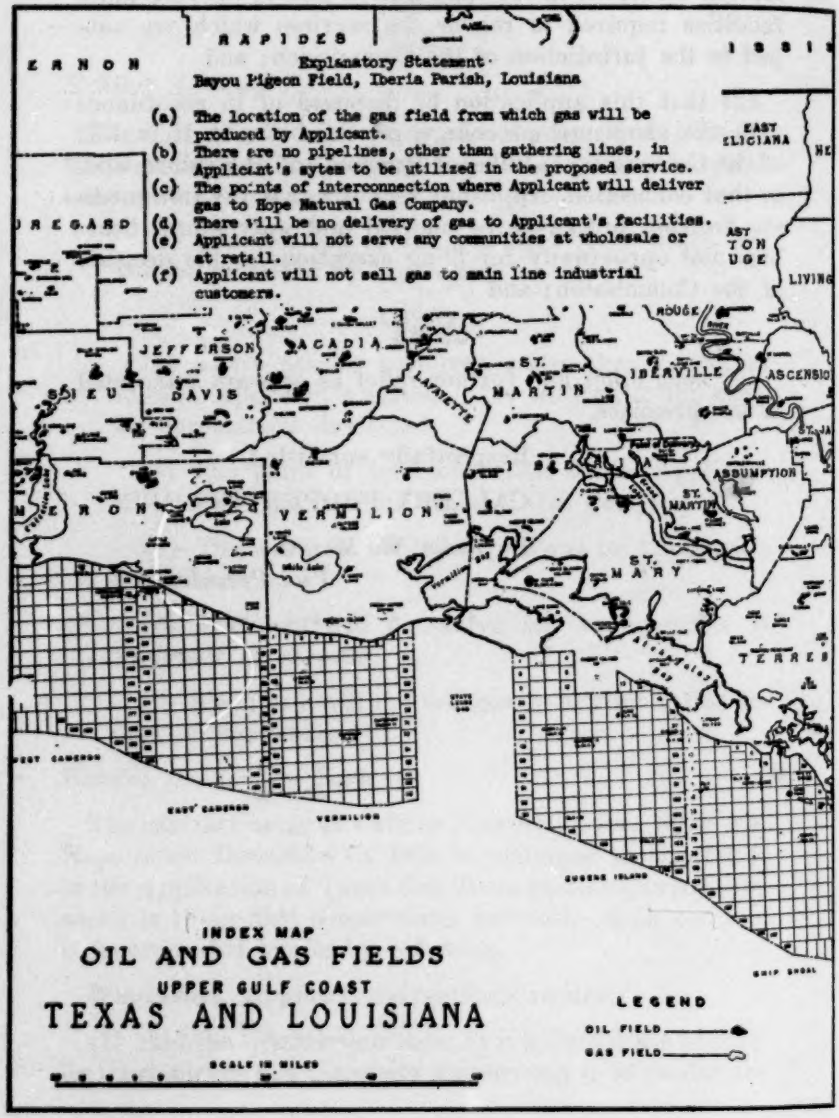
CALLERY PROPERTIES, INC.

By JOHN W. MARTIN

Vice-President

(C3985)

C3985


RAPIDES
Explanatory Statement
Bayou Pigeon Field, Iberia Parish, Louisiana
(a) The location of the gas field from which gas will be produced by Applicant.
(b) There are no pipelines, other than gathering lines, in Applicant's sytem to be utilized in the proposed service.
(c) The points of interconnection where Applicant will deliver gas to Hope Natural Gas Company.
(d) There will be no delivery of gas to Applicant's facilities.
(e) Applicant will not serve any communities at wholesale or at retail.
(f) Applicant will not sell gas to main line industrial customers.
JEFFERSON
ACADIA
ST. MARTIN
IBERVILLE
DAVIS
LAFAYETTE
VERMILION
ST. MARY
ASSUMPTION
INDEX MAP
OIL AND GAS FIELDS
UPPER GULF COAST
TEXAS AND LOUISIANA
SCALE IN MILES
LEGEND
OIL FIELD
GAS FIELD

C3989

BEFORE THE
FEDERAL POWER COMMISSION

Docket No. G-17341

In the Matter of

CALLERY PROPERTIES, INC., *et al.*

Application for Certificate of Public Convenience and Necessity

Comes now Callery Properties, Inc. ("Applicant") and hereby makes application, pursuant to and in accordance with the Federal Power Commission's Regulations under the Natural Gas Act, and Section 7 of the Natural Gas Act, as amended, for a Certificate of Public Convenience and Necessity covering the sale of natural gas as hereinafter particularly described.

Applicant specifically reserves the right to pursue any and all remedies which it may have relating to the asserted jurisdiction by the Federal Power Commission and this application is filed without prejudice to such rights.

In support of its application, Applicant respectfully shows as follows:

I

Description of Applicant

The exact legal name of Applicant herein is Callery Properties, Inc., a corporation organized under the laws of the State of Delaware, having its principal place of business in Houston, Texas.

Applicant is authorized to do business in the States of Delaware, Texas and Louisiana.

II

Person on Whom Papers Are to be Served

The name, title and post office address of the person to whom correspondence or communications in regard to this application are to be addressed are:

John W. Martin, Vice-President
Callery Properties, Inc.
400 Bank of the Southwest Building
Houston, Texas
and
May, Shannon & Morley
1700 K Street, N.W.
Washington 6, D. C.

III

Service to be Certificated

Applicant proposes to sell natural gas to Hope Natural Gas Company (Hope), pursuant to that certain contract between Callery Properties, Inc., et al, as Seller, and Hope Natural Gas Company, as Buyer, dated as of December 16, 1958. Applicant is advised and, therefore, alleges that such gas will be transported in interstate commerce, for the account of Hope, through pipelines owned and operated by Texas Gas Transmission Corporation and Texas Eastern Transmission Corporation for delivery into the facilities of, and

for resale by, Hope or Hope's affiliates. Applicant is further advised that Texas Gas and Texas Eastern are filing

applications concurrently herewith seeking authority to render such transportation service.

IV

Sources of Gas

All of the gas sold and delivered to Hope Natural Gas Company will be produced from acreage controlled by Applicant in the West Rayne Field, which is located in Acadia Parish, Louisiana. None of the gas involved will be purchased by Applicant from third parties.

The location of the West Rayne Field and the point of delivery to Hope Natural Gas Company are shown on Exhibit A, attached hereto.

V

Routes of Pipelines

There are no pipelines of the Applicant subject to the jurisdiction of the Commission over which the sale of natural gas to Hope Natural Gas Company will be accomplished.

VI

Communities Served

Applicant proposes to serve no communities, either at wholesale or at retail.

VII

Main Line Industrial Customers

Applicant proposes no sales to "Main Line Industrial Customers".

VIII

Major Appurtenances

Applicant will not own and operate any major appurtenances in rendering service to Hope Natural Gas Company as described hereinabove.

IX

Ownership

F. A. Callery, Inc. is the Operator of the property described herein. The ownership of the property under this contract is as follows:

Name	Percentum of Ownership Before Payout *	Percentum of Ownership After Payout *
David G. Baird	.72331	.48221
G. T. Baker	.96441	.64294
George L. Callery	—	.31138
Callery & Jones	—	10.62169
William D. Dana	1.08496	.72331
John Fell	.72331	.48221
Samuel Goldwyn	3.61655	2.41103
Robert Hamill	1.08497	.72331
Gerald Hochschild	.72331	.48221
Pauline Ickelheimer	.72331	.48221
Philip Isles	.72331	.48221
Grant Judge	—	1.66072
Herman Kahn	.96441	.64294
Mrs. Miles Kimball	.86798	.57865
Herbert Lehman	1.44662	.96441
Robert Lehman	1.44662	.96441
Maurice Levin	1.44662	.96441
Marvin Levy	.72331	.48221

C3993

Name	Percentum of Ownership Before Payout *	Percentum of Ownership After Payout *
Ted Leyhe	.86798	.57865
Paul Manheim	.72331	.48221
Morton J. May	.72331	.48221
Paul Mazur	.72331	.48221
Maurine Morse	1.44662	.96441
Henry L. Moses	.60276	.40184
Lucy G. Moses	.60276	.40184
Morris Natelson	.48221	.32147
Nicholas H. Noyes	1.44662	.96441
M. Peter Schweitzer	1.80827	1.20551
William P. Schweitzer	1.80827	1.20551
Sydney M. Schoenberg	3.61655	2.41103
Edwin J. Spiegel	.72331	.48221
Stone Oil Trust	—	1.24554
Donald S. Stralem	.72331	.48221
Joseph Thomas	.72331	.48221
Kilroy Properties, Inc.	41.51800	41.51800
Pioneer Oil & Gas Company	3.12500	3.12500
United Producing Company, Inc.	21.07210	18.66107
TOTAL	100.00000	100.00000

* The co-owners who provide the funds for payment of all property, drilling, and completion costs through the first well are entitled to recover such costs out of the net revenues from the production of such well before the carried interests participate in the revenues from the production or bear their share of the cost of operating the well.

X

Exhibits

Exhibit A—Map

There is attached hereto a general map of Applicant's facilities relating to the proposed sale of gas as described hereinabove, showing:

(a) The location of the gas field from which gas will be produced by Applicant;

(b) There are no pipelines, other than gathering lines in Applicant's system to be utilized in the service hereinabove described;

(c) The point of interconnection where Applicant will deliver gas to Hope Natural Gas Company;

(d) There will be no delivery of gas to Applicant's facilities;

(e) Applicant will not serve any communities at wholesale or at retail;

(f) Applicant will not sell gas to any main line industrial customers.

Exhibit B—Service Contract

The contract between Callery Properties, Inc., et al and Hope dated December 16, 1958 is contained in Exhibit H to the Application of Texas Gas Transmission Corporation which is being filed concurrently herewith. Such contract is incorporated herein by reference.

WHEREFORE, Applicant respectfully requests:

(1) that the Commission issue to it a Certificate of Public Convenience and Necessity authorizing it to render the

service described in this application and to operate those facilities required to render the services which are subject to the jurisdiction of the Commission; and

(2) that this application be disposed of in accordance with the shortened procedure provided for in Rule 1.32 of the Commission's General Rules of Practice and Procedure, and, in that connection, Applicant requests that the intermediate decision procedure be omitted and waives oral hearings and opportunity for filing exceptions to the decision of the Commission; and

(3) such other and further relief as appears warranted in the premises.

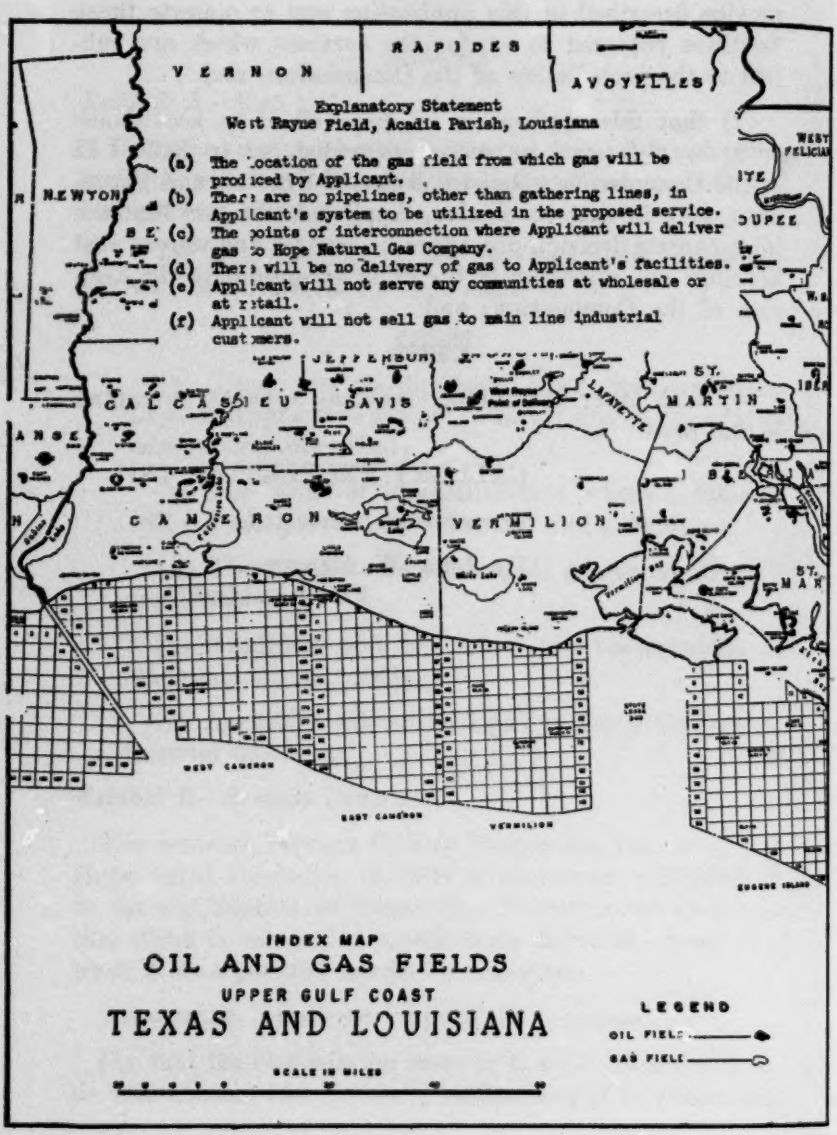
CALLERY PROPERTIES, INC.

Respectfully submitted,

By JOHN W. MARTIN
Vice-President

(C3997)

C3997


VERNON
RAPIDES
AVOYELLES
Explanatory Statement
West Rayne Field, Acadia Parish, Louisiana
(a) The location of the gas field from which gas will be produced by Applicant.
(b) There are no pipelines, other than gathering lines, in Applicant's system to be utilized in the proposed service.
(c) The points of interconnection where Applicant will deliver gas to Hope Natural Gas Company.
(d) There will be no delivery of gas to Applicant's facilities.
(e) Applicant will not serve any communities at wholesale or at retail.
(f) Applicant will not sell gas to main line industrial customers.
NEWTON
JEFFERSON DAVIS
CALCASIEU
LAFAYETTE
ST. MARTIN
CAMERON
VERMILION
WEST CAMERON
EAST CAMERON
VERMILION
INDEX MAP
OIL AND GAS FIELDS
UPPER GULF COAST
TEXAS AND LOUISIANA
LEGEND
OIL FIELD
GAS FIELD
SCALE IN MILES

C4264

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

In the Matters of

Docket No. G-17335
TEXAS GAS TRANSMISSION CORPORATION

Docket No. G-17420
TEXAS EASTERN TRANSMISSION CORPORATION

Docket No. G-17565
HOPE NATURAL GAS COMPANY

Docket No. G-17336
TEXAS GAS EXPLORATION CORPORATION

Docket No. G-17337
J. RAY MCDERMOTT & CO., INC.

Docket No. G-17338
KILROY PROPERTIES INCORPORATED, *et al.*

Docket No. G-17339
THE CALIFORNIA COMPANY

Docket Nos. G-17340 and G-17341
CALLERY PROPERTIES, INC.

Docket Nos. G-17342 and G-17343
OCEAN DRILLING & EXPLORATION COMPANY

Docket No. G-17391
HUMBLE OIL & REFINING COMPANY

Docket Nos. G-17393 and G-17407
AMERADA PETROLEUM CORPORATION

Docket No. G-17396
KERR-MCGEE OIL INDUSTRIES, INC.

(C4264)

Docket No. G-17397
BEL OIL CORPORATION

Docket No. G-17398
CAROLINE HUNT SANDS AND LOYD B. SANDS

Docket No. G-17399
RICHARDSON & BASS (Louisiana Account), *Operator*

Docket No. G-17401
MAGNOLIA PETROLEUM COMPANY

Docket No. G-17402
BECK OIL COMPANY, *et al.*

Docket No. G-17405
PHILLIPS PETROLEUM COMPANY

Docket No. G-17413
MISSISSIPPI RIVER FUEL CORPORATION

Docket No. G-17457
UNION OIL COMPANY OF CALIFORNIA
Docket Nos. G-17463, G-17474, G-17475 and G-17483
TIDEWATER OIL COMPANY

Docket Nos. G-17554 and G-17566
CONTINENTAL OIL COMPANY

Docket No. G-17560
SHELL OIL COMPANY

Docket No. G-17574
PAN AMERICAN PETROLEUM CORPORATION

Notice of Applications and Consolidation of Proceedings

(February 9, 1959)

Take notice that each of the above designated parties has filed an application, in the respective dockets listed, for a

certificate of public convenience and necessity, pursuant to Section 7(c) of the Natural Gas Act, authorizing the respective acts and services described below, subject to the jurisdiction of the Commission, all as more fully represented in the applications which are on file with the Commission and open to public inspection.

C4265

Docket No. G-17335

On December 24, 1958, Texas Gas Transmission Corporation (Texas Gas), a Delaware Corporation with its principal place of business in Owensboro, Kentucky, filed an application for a certificate of public convenience and necessity, pursuant to Section 7 of the Natural Gas Act, authorizing the construction, installation and operation of certain facilities and the transportation of natural gas, as hereinafter described, subject to the jurisdiction of the Commission, all as more fully described in the application which is on file with the Commission and open to public inspection.

Texas Gas proposes to gather and transport through its pipeline system up to 100,000 Mcf [1] of natural gas per day, on a firm basis, for the account of Hope Natural Gas Company (Hope). Such gas will be purchased or produced by Hope from fields located within, and offshore from, the State of Louisiana. Delivery will be made to Texas Gas in the fields and Texas Gas will transport the gas through its system for delivery to, or for the account of, Hope at the existing interconnection of the facilities of Texas Gas and Texas Eastern Transmission Corporation (Texas Eastern) near Lebanon, Ohio.

The facilities for which Texas Gas is requesting authorization are as follows:

[1] All volumes are stated herein at a pressure base of 15.025 psia.

(C4265)

(1) Approximately 164.63 miles of 30-inch loop line and approximately 80.92 miles of 26-inch loop line in the States of Louisiana, Arkansas, Mississippi, Tennessee, Kentucky, Indiana and Ohio.

(2) One 26-inch river crossing in the State of Kentucky.

(3) Approximately 103.64 miles of supply lines ranging in size from 2 3/8 inch to 12 3/4 inch pipe in the State of Louisiana and adjacent off-shore areas.

(4) Seven additional compressor units, totaling 14,000 horsepower, in existing compressor stations.

(5) An additional 1,760 horsepower compressor station near Lafayette, Louisiana.

(6) Twelve meter stations, one check meter station and miscellaneous appurtenant equipment in the State of Louisiana and adjacent offshore areas.

The above proposed facilities will increase the design daily delivery capacity of Texas Gas' pipeline system by 100,000 Mcf. The entire increase in capacity will be used to transport gas for Hope.

C4266

Texas Gas proposes to finance the facilities, which are estimated to cost $39,600,000, through the issuance of $30,000,000 of first mortgage pipeline bonds, the sale of common stock and the use of retained earnings.

Docket No. G-17420

On January 5, 1959, Texas Eastern, a Delaware corporation with its principal place of business in Shreveport, Louisiana, filed an application for a certificate of public convenience and necessity, pursuant to Section 7 of the Natural Gas Act, authorizing the construction and operation of certain facilities and the transportation of

natural gas, as hereinafter described, subject to the jurisdiction of the Commission, all as more fully described in the application which is on file with the Commission and open to public inspection.

Texas Eastern proposes to accept delivery from Texas Gas for the account of Hope at the existing interconnection of the facilities of Texas Eastern and Texas Gas near Lebanon, Ohio and to transport and deliver to Hope, or for the account of Hope to Hope's affiliates in the Consolidated Natural Gas System, at the points of delivery presently existing within Texas Eastern's existing Zone C, such volumes of natural gas as are tendered for transportation for Hope up to a maximum daily quantity of 100,000 Mcf.

In order to render such service, Texas Eastern seeks authorization to place in gas service and operate the following existing facilities:[2]

(1) Approximately 189 miles of existing 20-inch pipeline extending from Compressor Station No. 16 near Middletown, Ohio to a point of interconnection on Texas Eastern's system near Moundsville, West Virginia; and

(2) Two 2,000 horsepower, two 1,750 horsepower and four 1,250 horsepower electric compressor units at existing compressor stations.

Texas Eastern also seeks authority to construct and operate approximately 3,100 additional horsepower at existing compressor stations.

The estimated total construction cost of the proposed facilities (excluding the depreciated original cost of $6,617,007.81 attributable to the existing facilities to be re-activated) is approximately $2,284,000. Texas Eastern

[2] These are part of the facilities which the Commission authorized Texas Eastern to abandon from gas service in Docket No. G-2503.

proposes to finance the cost of the proposed facilities from funds on hand.

C4267

Docket No. G-17565

On January 19, 1959, Hope, a West Virginia Corporation with its principal office in Clarksburg, West Virginia, filed an application for a certificate of public convenience and necessity, pursuant to Section 7 of the Natural Gas Act, authorizing the establishment of new delivery points to certain of its affiliated customers in the Consolidated Natural Gas System, all as more fully described in the application which is on file with the Commission and open to public inspection.

The gas which will be delivered by Hope to such customers will be purchased and produced by Hope from fields in the State of Louisiana and adjacent offshore areas and will be transported by Texas Gas and Texas Eastern to, or for the account of, Hope. The points of delivery proposed by Hope are existing delivery points presently utilized by Texas Eastern for the delivery of gas to Hope's affiliated customers. No new facilities are required by Hope in order to establish such delivery points.

The respective applicants listed in the table below filed applications on the dates shown for certificates of public convenience and necessity, pursuant to Section 7 of the Natural Gas Act, authorizing the sale of natural gas to Hope from the fields listed opposite the name of each applicant.

Docket No.	Applicant	Address	Location of Field Parish & State	Date Field
G-17336	Texas Gas Exploration Corporation, Operator	Houston, Texas	Perry, Vermilion Parish, Louisiana	12/24/58
G-17337	J. Ray McDermott & Co., Inc., Operator	Houston, Texas	Block 33, offshore West Cameron Area, Louisiana	12/24/58
G-17338	Kilroy Properties Incorporated, *et al.*	Houston, Texas	Bayou Pigeon, Iberia Parish, Louisiana	12/24/58
G-17339	The California Company	New Orleans, Louisiana	South Bosco, Acadia Parish Louisiana	12/24/58
G-17340	Callery Properties, Inc.	Houston, Texas	Bayou Pigeon, Iberia Parish, Louisiana	12/24/58
		C4268		
G-17341	Callery Properties, Inc., *et al.*	Houston, Texas	West Rayne, Acadia Parish, Louisiana	12/24/58
G-17342	Ocean Drilling and Exploration Company	New Orleans, Louisiana	Block 4, offshore East Cameron Area, Louisiana	12/24/58
G-17343	Ocean Drilling and Exploration Company	New Orleans, Louisiana	Bayou Pigeon, Iberia and St. Martin Parishes, Louisiana	12/24/58
G-17391	Humble Oil & Refining Company	Houston, Texas	Bayou Pigeon, Iberia Parish, Louisiana	12/29/58
G-17393	Amerada Petroleum Corporation	Tulsa, Oklahoma	Perry, Vermilion Parish, Louisiana	12/29/58
G-17407	Amerada Petroleum Corporation	Tulsa, Oklahoma	North Abbeville, Vermilion Parish, Louisiana	12/29/58
G-17396	Kerr-McGee Oil Industries, Inc.	Oklahoma City, Oklahoma	Block 33, offshore West Cameron Area, Louisiana	12/29/58
G-17397	Bel Oil Corporation	Lake Charles, Louisiana	South Thornwell, Jefferson Davis and Cameron Parishes, Louisiana	12/24/58

(C4268)

Docket No.	Applicant	Address	Location of Field Parish & State	Date Field
G-17398	Caroline Hunt Sands and Loyd B. Sands	Dallas, Texas	South Thornwell, Jefferson Davis and Cameron Parishes, Louisiana	12/24/58

C4269

G-17399	Richardson & Bass (Louisiana Account), Operator	Fort Worth, Texas	Abbeville, Jefferson Island, South Rayne, Woodlawn and Maxie Fields, Vermilion, Iberia, Acadia, Jefferson Davis and Lafayette Parishes, Louisiana	12/29/58
G-17401	Magnolia Petroleum Company	Dallas, Texas	Block 4, offshore East Cameron Area, Louisiana	12/29/58
G-17402	Beck Oil Company, *et al.*	Houston, Texas	Perry, Vermilion Parish, Louisiana	12/29/58
G-17405	Phillips Petroleum Company	Bartlesville, Oklahoma	Block 33, offshore West Cameron Area, Louisiana	12/29/58
G-17413	Mississippi River Fuel Corporation	St. Louis, Missouri	Block 4, offshore East Cameron Area, Louisiana	12/31/58
G-17457	Union Oil Company of California	Los Angeles, California	Bayou, Pigeon, Iberia Parish, Louisiana	1/5/59
G-17463	Tidewater Oil Company	Los Angeles, California	Perry, Vermilion Parish, Louisiana	1/5/59
G-17474	Tidewater Oil Company	Los Angeles, California	South Bosco, Acadia and Lafayette Parishes Louisiana	1/8/59
G-17475	Tidewater Oil Company	Los Angeles, California	West Rayne, Acadia Parish, Louisiana	1/8/59
G-17483	Tidewater Oil Company	Los Angeles, California	Jefferson Island, Vermilion, Iberia and Lafayette Parishes, Louisiana	1/9/59

C4270

Docket No.	Applicant	Address	Location of Field Parish & State	Date Field
G-17554	Continental Oil Company	Houston, Texas	Bayou Pigeon, Iberia Parish, Louisiana	1/15/59
G-17566	Continental Oil Company	Houston, Texas	West Rayne, Acadia Parish, Louisiana	1/19/59
G-17560	Shell Oil Company	New York, New York	Bayou Pigeon, Iberia Parish, Louisiana	1/16/59
G-17574	Pan American Petroleum Corporation	Tulsa, Oklahoma	Jefferson Island, Iberia and Vermilion Parishes, Louisiana	1/20/59

These related matters should be heard on a consolidated record and disposed of as promptly as possible under the applicable rules and regulations, and to that end the above matters are hereby consolidated.

Protests or petitions to intervene may be filed with the Federal Power Commission, Washington 25, D. C., in accordance with the Rules of Practice and Procedure (18 CFR 1.8 or 1.10) on or before March 4, 1959.

MICHAEL J. FARRELL,
Acting Secretary

C4682

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Jerome K. Kuykendall, Chairman; Frederick Stueck, William R. Connolo, Arthur Kline and John B. Hussey.

In the Matters of

Docket No. G-17335
TEXAS GAS TRANSMISSION CORPORATION

Docket No. G-17420
TEXAS EASTERN TRANSMISSION CORPORATION

Docket No. G-17565
HOPE NATURAL GAS COMPANY

Docket No. G-17336
TEXAS GAS EXPLORATION CORPORATION

Docket No. G-17337
J. RAY MCDERMOTT & CO., INC.

Docket No. G-17338
KILROY PROPERTIES INCORPORATED, *et al.*

Docket No. G-17339
THE CALIFORNIA COMPANY

Docket Nos. G-17340 and G-17341
CALLERY PROPERTIES, INC.

Docket Nos. G-17342 and G-17343
OCEAN DRILLING & EXPLORATION COMPANY

Docket No. G-17391
HUMBLE OIL & REFINING COMPANY

Docket Nos. G-17393 and G-17407
AMERADA PETROLEUM CORPORATION

Docket No. G-17396
KERR-MCGEE OIL INDUSTRIES, INC.

Docket No. G-17397
BEL OIL CORPORATION

Docket No. G-17398
CAROLINE HUNT SANDS AND LOYD B. SANDS

Docket No. G-17399
RICHARDSON & BASS (Louisiana Account), *Operator*

Docket No. G-17401
MAGNOLIA PETROLEUM COMPANY

Docket No. G-17402
BECK OIL COMPANY, *et al.*

Docket No. G-17405
PHILLIPS PETROLEUM COMPANY

Docket No. G-17413
MISSISSIPPI RIVER FUEL CORPORATION

Docket No. G-17457
UNION OIL COMPANY OF CALIFORNIA
Docket Nos. G-17463, G-17474, G-17475 and G-17483
TIDEWATER OIL COMPANY

Docket Nos. G-17554 and G-17566
CONTINENTAL OIL COMPANY

Docket No. G-17560
SHELL OIL COMPANY

Docket No. G-17574
PAN AMERICAN PETROLEUM CORPORATION

Order Denying Rehearing

(Issued July 2, 1959)

On June 9, 1959, Tennessee Gas Transmission Company (Tennessee) filed an application for rehearing of our order issued May 29, 1959, in the above-entitled proceedings denying Tennessee's petition to intervene and granting limited participation by Tennessee in said proceedings.

C4683

The Commission finds:

The assignments of error and grounds for rehearing in the application for rehearing present no new facts or principles of law which were not fully considered by the Commission when it issued its order of May 29, 1959, or which having now been considered warrant any change or modification of said order.

The Commission orders:

The application filed by Tennessee on June 9, 1959, for rehearing of the Commission's order of May 29, 1959, is hereby denied.

By the Commission.

JOSEPH H. GUTRIDE,
Secretary.

C4724

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Jerome K. Kuykendall, Chairman; Frederick Stueck, Arthur Kline and John B. Hussey.

In the Matters of

Docket No. G-17335
TEXAS GAS TRANSMISSION CORPORATION

Docket No. G-17420
TEXAS EASTERN TRANSMISSION CORPORATION

Docket No. G-17565
HOPE NATURAL GAS COMPANY

Docket No. G-17336
TEXAS GAS EXPLORATION CORPORATION

Docket No. G-17337
J. Ray McDermott & Co., Inc.

Docket No. G-17338
Kilroy Properties Incorporated, *et al.*

Docket No. G-17339
The California Company

Docket Nos. G-17340 and G-17341
Callery Properties, Inc.

Docket Nos. G-17342 and G-17343
Ocean Drilling & Exploration Company

Docket No. G-17391
Humble Oil & Refining Company

Docket Nos. G-17393 and G-17407
Amerada Petroleum Corporation

Docket No. G-17396
Kerr-McGee Oil Industries, Inc.

Docket No. G-17397
Bel Oil Corporation

Docket No. G-17398
Caroline Hunt Sands and Loyd B. Sands

Docket No. G-17399
Richardson & Bass (Louisiana Account), *Operator*

Docket No. G-17401
Magnolia Petroleum Company

Docket No. G-17402
Beck Oil Company, *et al.*

Docket No. G-17405
Phillips Petroleum Company

(C4724)

Docket No. G-17413
MISSISSIPPI RIVER FUEL CORPORATION

Docket No. G-17457
UNION OIL COMPANY OF CALIFORNIA
Docket Nos. G-17463, G-17474, G-17475 and G-17483
TIDEWATER OIL COMPANY

Docket Nos. G-17554 and G-17566
CONTINENTAL OIL COMPANY

Docket No. G-17560
SHELL OIL COMPANY

Docket No. G-17574
PAN AMERICAN PETROLEUM CORPORATION

Opinion No. 327—Opinion and Order Issuing Certificates of Public Convenience and Necessity

(Issued August 10, 1959)

These consolidated proceedings involve a proposal whereby Hope Natural Gas Company would purchase and produce natural gas from 11 fields in southern Louisiana and have such gas gathered, transported, and delivered through the facilities of the Texas Gas Transmission Cor-

C4725

poration, and Texas Eastern Transmission Corporation to its own system or to various member companies of the Consolidated Natural Gas System for its account. Thirty-one related applications were filed by 24 companies, each for a certificate of public convenience and necessity for the distribution or sale of natural gas in interstate commerce, or the construction of facilities or establishment of delivery points therefor, pursuant to Section 7(c) of the Natural Gas Act. After hearings, the exchange of briefs,

waiver of intermediate decision procedure and oral argument, the applications and the issues raised by them are before us for decision. Upon such conditions as we believe to be necessary in the public interest, we are granting the applications as set forth below.

THE APPLICATIONS

The facilities which Texas Gas in Docket No. G-17335 proposes to construct for gathering the gas in southern and offshore Louisiana and transporting and delivering it to an existing interconnection of the facilities of Texas Gas and Texas Eastern near Lebanon, Ohio are as follows:

1. Approximately 164.63 miles of 30-inch loop line and approximately 80.92 miles of 26-inch loop line in the States of Louisiana, Arkansas, Mississippi, Tennessee, Indiana, and Ohio;
2. One 26-inch river crossing in the State of Kentucky;
3. Approximately 103.64 miles of supply lines ranging in size from 2 3/8 inch to 12 3/4 inch pipe in the State of Louisiana and adjacent offshore areas;
4. Seven additional compressor units, totaling 14,000 horsepower at existing compressor stations;
5. An additional 1760 horsepower compressor station near Lafayette, Louisiana; and
6. Twelve meter stations, one check meter station and miscellaneous appurtenant equipment in the State of Louisiana and adjacent offshore areas.

The above-proposed facilities will increase the design daily delivery capacity of Texas Gas' main pipeline system by 100,000 Mcf. The entire increase in capacity will be used to transport gas for Hope. The additional facilities will cost approximately $39,600,000 which Texas Gas proposes

to finance through the issuance of $30,000,000 of first mortgage pipeline bonds, the sale of equity securities and the use of retained earnings.

C4726

Texas Eastern in Docket No. G-17420, in order to transport such gas from near Lebanon and deliver it to Hope or for Hope's account, seeks authorization to place in gas service and operate the following existing facilities:

1. Approximately 189 miles of existing 20-inch pipeline extending from Compressor Station No. 16 near Lebanon, Ohio to a point of interconnection on Texas Eastern's system near Moundsville, West Virginia; and
2. Two 2000 horsepower, two 1750 horsepower and four 1250 horsepower electric compressor units at existing compressor stations.

Texas Eastern also seeks authority to construct and operate approximately 3100 additional horsepower at existing compressor stations. The estimated cost of the facilities proposed by Texas Eastern (excluding $6,670,000 which represents the depreciated value of the facilities it is reactivating) is approximately $2,230,000. Texas Eastern proposes to finance the cost of the proposed facilities from funds on hand.

Hope, by its application in Docket No. G-17565, seeks authorization to establish new delivery points to affiliated customers on the Consolidated Natural Gas System to deliver and sell up to 100,000 Mcf per day of natural gas (15.025 psia) to be purchased from the producer applicants and produced by Hope from various fields in the southern Louisiana and adjacent offshore areas. No new facilities are required or proposed by Hope in order to establish the new delivery points to its affiliated customers, since these necessary delivery points are existing interconnections be-

tween Texas Eastern and Hope and its affiliated customers.[1]

The remaining applications are by independent producers who seek authorization to sell natural gas to Hope from fields in southern Louisiana and adjacent offshore areas.

Procedural Steps

Notice of these related applications and consolidation thereof for hearing was issued by the Commission on February 9, 1959, and published in the Federal Register on February 14, 1959 (24 FR 1166). The following parties filed petitions for leave to intervene which were granted by the Commission in its order of May 29, 1959: The Ohio Fuel Gas Company; Memphis Light, Gas and Water Division; Mississippi Valley Gas Company; MidSouth Gas Company; and The Manufacturers Light and Heat Company. The New York Public Service Commission filed a Notice of Intervention and was also permitted to intervene

by the same order. A Petition to Intervene filed by the City of Memphis, Tennessee was denied by the above order because it was not filed within the time provided for in the notice of February 9, 1959. By separate order of the same date, the Petition to Intervene filed by the Tennessee Gas Transmission Company was denied, and Tennessee was permitted to participate for the limited purpose of showing to what extent, if any, its marketing of gas to Consolidated Natural Gas System companies would be affected in the event certificates should be issued to the applicants. On June 9, 1959, Tennessee filed an application for rehearing

[1] These customers include all of Hope's operating affiliates except Lake Shore Pipeline Company, as follows: The East Ohio Gas Company, New York State Natural Gas Corporation, The Peoples Natural Gas Company, and The River Gas Company. These companies constitute the Consolidated Natural Gas System.

of this order, which was denied by the Commission in its order of July 2, 1959. Pursuant to notice of date of hearing dated April 29, 1959, these proceedings came on for hearing on June 10, 1959, and the hearing was concluded on June 25, 1959.

At the conclusion of the hearing, counsel for Hope moved for omission of the intermediate decision procedure. The Commission, in its order issued July 2, 1959 waived intermediate decision procedure, fixed July 16, 1959 as the date for filing initial briefs, directed that any parties wishing to file reply briefs do so by July 20, 1959, and on July 21, 1959, oral argument was held.

The Issues

Generally, the issues presented in this case may be reduced to the questions of whether the various applicants should be granted certificates for their proposals and whether it will be necessary to attach conditions to any certificates which we may find to be required by the public convenience and necessity. To determine these issues, it will be necessary to determine the more specific issues of (1) are the reserves of Hope sufficient to support the proposed construction by Texas Gas and Texas Eastern, (2) the propriety of the rates proposed by Texas Gas, (3) the system design and proposed rates of Texas Eastern, and (4) have the sales of the independent producers at the proposed rates been shown to be consistent with the public interest.

While each application is, in effect, dependent upon the other applications, for the purposes of convenience in our discussion we will deal separately with each proposal except those of the producers, which will be considered together.

THE HOPE PROPOSAL

The application of Hope involves no new facilities and is simply an indirect extension to south Louisiana of Hope's facilities to enable it to produce or purchase directly as

much gas as can be obtained in such manner for the Consolidated System consistent with its past practice.[2] This is not the type of transportation arrangement to which we objected in our Opinion No. 315-A, for here there is no proposal to make non-jurisdictional purchases and reserve a portion of a pipeline's capacity for an inferior end use.

The entire project is subject to our jurisdiction and the additional gas will be distributed by Hope throughout the Consolidated System for the same type services which the System has rendered for over half a century. The need of the Consolidated System for this additional gas was unquestioned at the hearing and detailed evidence was presented showing through past experience and future estimates that there will be a definite deficiency in the Consolidated System's gas supplies if additional gas is not obtained at once. (Exhibit 13).

Our staff has raised the point that there may be some question as to the adequacy of Hope's newly obtained gas supplies to justify the expansion of the Texas Gas and Texas Eastern systems. If Hope takes delivery of its full 100,000 Mcf per day, the evidence shows that there will be a reserve life index of approximately 16 years and a deliverability life of over 12 years. If Hope is unable to take 100,000 Mcf per day for 365 days per year, as the evidence indicates may be the situation, these figures will

[2] Between 1898 and 1943, Hope produced or purchased directly all of its gas from wells in the Appalachian area and the entire Consolidated System received its gas from this source. At present, about 27% of the System's gas supply is so obtained.

be increased up to two years both as to reserve and as to the deliverability. In addition to this, Hope's claimed reserves include only those reserves available from 7,000 acres of the 35,000 dedicated under the producer contracts. This additional acreage is in a highly productive area where further development will undoubtedly result in increasing Hope's available supplies.

In our Opinion No. 321, issued May 22, 1959, we granted authorization to Trunkline Gas Company to expand its system upon a showing of 11.5 to 13 years deliverability life. On May 12, 1959, in Opinion No. 320, we permitted Tennessee Gas Transmission Company to expand its system on a showing of a deliverability life of 11 years. While we consider these figures to be the minimum we can permit, we also consider that for established companies with a proven ability to attach new sources, such as is the case here, this minimum will support an expansion program.

Hope will require no financing for its proposal and does not seek a change in its presently effective rates. Accordingly, insofar as Hope is concerned, certification may be granted as requested.

C4729

The Texas Gas Proposal

The facilities which Texas Gas proposes to construct and operate appear adequate to enable it to render the proposed transportation service to Hope without impairing in any way its ability to maintain adequate service to its existing customers. The main line facilities, consisting of loop lines and added compression facilities, were designed to add 100,000 Mcf per day capacity from Eunice, Louisiana to Lebanon, Ohio. The supply facilities, consisting of branch lines and feeder lines from Hope's supply areas to Texas Gas' existing lines, are designed to carry 125% of

the supply contract quantities in order to provide the flexibility allowed by Hope's supply contracts. Although these supply facilities will actually deliver approximately 150,000 Mcf per day to the main line station at Eunice, Louisiana, we conclude that the design is reasonable in that it will permit Texas Gas to transport the 100,000 Mcf per day regardless of the various supply areas from which any given day's requirement is scheduled.

Texas Gas estimates the cost of all the proposed facilities will be approximately $39,600,000, and we find this estimate to be both adequate and reasonable. No issue has been raised as to Texas Gas' ability to finance its project. Texas Gas proposes to finance the new construction by the sale of $30,000,000 of 20-year first mortgage bonds and the issuance of $10,000,000 of equity securities. Arrangements for permanent financing have not been completed but are expected to be arranged in the latter part of 1959 or early 1960. Pending arrangements for permanent financing, Texas Gas has obtained an outstanding line of bank credit in the amount of $40,000,000, available for use for construction at the prime rate at the time of borrowing. Texas Gas' over-all debt-equity capitalization ratio will remain within the standards employed by the Commission. We conclude that Texas Gas will be able properly to finance the proposed project.

The Texas Gas-Hope contract provides for two, two-part rates for the transportation service. These consist of a "gathering rate" of $0.50 demand and 1.7¢ commodity and a "transportation rate" of $2.00 demand and 7.4¢ commodity. In support thereof, Texas Gas presented two cost allocation studies, (1) a facilities allocation, and (2) a zone allocation of estimated costs on Texas Gas' line from Eunice, Louisiana, to Lebanon, Ohio, allocated on a rolled-in system-wide basis and with incremental "gathering

costs" south of Eunice charged solely to Hope. The rate of return used for these studies was 6 ¼%.

The primary issue raised with respect to the proposed rates of Texas Gas is the cost treatment of the supply facilities to be constructed south of Eunice, Louisiana. Hope, Texas Gas and the intervenors, Memphis Light, Gas and Water Division, MidSouth Gas Company, Mississippi Valley Gas Company, The Manufacturers Light and Heat Company, and The Ohio Fuel Gas Company, unanimously contend that since these facilities will be, for the present at least, used only to transport gas belonging to Hope,

the costs incurred in connection therewith should be borne by Hope. On the other hand, the staff contends that these facilities should be "rolled in" as a part of the costs of operating an integrated system for the benefit of all customers served by that system. The staff argues that the proposed facilities actually will extend the range of Texas Gas' gathering system into new areas of supply and, in addition, contain excess capacity within the framework of the transportation contract which is always available to Texas Gas for transporting its own gas, so that Texas Gas could, if it desired, under a budget type certificate attach additional supplies of gas and transport it over these lines without any additional expansion or further authorization from the Commission.

While we are concerned lest our action in this case be interpreted as a general departure from our policy of "rolling in" the cost of new supply facilities with over-all system costs, we feel that the circumstances in this case permit, for the time being, a rate which requires Hope to bear the full costs incurred by Texas Gas in connection with these facilities. Accordingly, we shall permit the direct facilities cost treatment used in the design of the

transportation rate with the proviso that should Texas Gas in the future utilize any of these supply lines for transporting its own supplies of gas, then at such time all of the supply facilities herein authorized shall be "rolled in" with system-wide costs for the purpose of determining proper rates; and further that Texas Gas shall not attach any of its own supplies of gas to these supply lines without obtaining the specific approval of this Commission. Because of our continuing jurisdiction over the rates and operations of Texas Gas, with changes continually occurring, we may in the future take such action as a proper record may require in connection with any future rate or certificate proceeding instituted by or against Texas Gas, without regard to the occurrence of the utilization of the facilities in the manner discussed above.

The staff has raised further issues regarding Texas Gas' method for computing the proposed rate. These are (1) the use of a 6¼% rate of return which the staff contends should be no more than 6%, (2) the failure of Texas Gas to credit working capital with Federal income tax accruals which the staff contends should have been credited with 50% of such taxes as being the average amount available for use by Texas Gas, (3) the charging of production costs 50% to demand and 50% to commodity, which the staff contends should be charged 100% to commodity, and (4) the use of a separate "gathering rate" and "transportation rate" which the staff contends should be combined into a single "transportation rate." Texas Gas has indicated in its brief that it would have no objection to the use of a single rate and we conclude that a single rate would more properly reflect the single transportation service proposed.

We agree with the staff that if a departure from the 6% rate of return previously allowed Texas Gas is to be made, it should be done only after a proper record in a rate

proceeding where all the factors involved could be properly evaluated. Our language in Opinion No. 315 (20 FPC 264) is equally applicable here:

> . . . without some more convincing showing than that heretofore made, the rate of return on the storage facilities should not exceed 6%. Fransco's present rates are fixed on the basis of a 6% rate of return and it would be illogical to provide for a different rate on this portion of its facilities.

The policy of offsetting working capital requirements by the average amount of income tax accruals and classification of production expense 100% to commodity are so well established and have been so constantly followed by this Commission that we deem it unnecessary to comment upon them at this time except to state that we find nothing in this record which would justify treating those two items in any other manner.

Accordingly, we conclude that the certificate herein issued to Texas Gas should be conditioned upon the filing of a rate schedule computed in the manner hereinbefore discussed.

The cost studies presented in this proceeding result in rates substantially the same when computed without the proposed adjustments. Since, absent the "rolled in" cost treatment of supply facilities issue, no serious objection was made by any party to the allocation method used by Texas Gas in its Exhibit 11, we conclude that the rates of Texas Gas may be based on the study made in that exhibit; provided, however, that a single transportation rate consisting of a demand charge and commodity charge and computed on the basis of a 6% rate of return, the crediting of working capital requirements with 50% of Federal income tax related to such return and with production

expense classified 100% to commodity shall be filed. The use of Exhibit 11 for the purpose of computing the proper rate for Hope in this proceeding does not constitute approval of the allocation method or study used in that exhibit for determination of rates on the Texas Gas system in any pending or future rate or certificate proceeding. These initial rates of Texas Gas shall be filed with the understanding that Texas Gas may file rate changes, as it is entitled to do under Section 4 of the Natural Gas Act.

The Texas Eastern Proposal

Texas Eastern proposes to reactivate 189 miles of the 20-inch "Little Inch" pipeline lying between Lebanon, Ohio and Moundsville, West Virginia. This is a portion of the Little Inch Line which Texas Eastern was authorized to abandon in Docket No. G-2503. In addition, Texas Eastern proposes to reactivate or construct certain compressor facilities on the Little Inch Line and on its existing 24-inch and 26-inch lines which parallel the Little Inch. All these lines and compressors will be operated as an integrated pipeline system, being interconnected at each of the compressor stations on the lines. With the exception of the specific compressor facilities discussed below, we find that the facilities which Texas Eastern proposes to reactivate

or construct are adequate to render the proposed transportation service and that their construction and operation are required by the public convenience and necessity.

Texas Eastern proposes to reactivate or construct certain compression facilities which are clearly in excess of facilities necessary to provide additional capacity of 100,000 Mcf per day over its existing capacity. These excess facilities are as follows:

Station 17 1—2000 horsepower unit
Station 18 1—1100 horsepower unit
Station 19 2—1250 horsepower units

The record does not show that the public convenience and necessity requires the installation of these excess compressor facilities. Examination of the flow diagrams submitted by Texas Eastern reveals that excess horsepower will exist at each of the stations, 17, 18 and 19, even without the installation of the compressor units listed above. The general statements of Texas Eastern's design witness regarding the need for flexibility in this portion of the line is not supported by any concrete showing of the need therefor. Accordingly, authorization to install and operate these facilities should be denied on the basis of the record. Should Texas Eastern, in a future application, desire to present a more complete showing of the need for these facilities, we will again consider the necessity for their installation.

The total cost of reactivating and constructing all of the facilities proposed is estimated by Texas Eastern to be $2,230,000 which the evidence shows Texas Eastern can finance from funds on hand. Texas Eastern assigns a depreciated original cost of $6,670,000 to the facilities to be reactivated. We conclude that Texas Eastern can adequately finance the proposed project. However, since we are authorizing construction or reactivation of only a portion of the facilities proposed, appropriate adjustments should be made to the accounting entries proposed by Texas Eastern. Accordingly, we shall condition the certificate to require Texas Eastern to file adjusted accounting entries satisfactory to the Commission reflecting the depreciated original cost of only such of the facilities as are herein authorized to be reactivated.

There is no conclusive or substantial evidence in the record to support the rate of 4 ½¢ per Mcf which Texas

Eastern proposes to charge Hope for transporting its gas. Examination of the purported incremental cost study presented by Texas Eastern reveals that it includes even those excess compressor facilities which we have determined should not be certificated, and that it has no relationship to the cost of the proposed transportation service. Such a study is of no assistance to the Commission in determining whether or not the contract price provides a proper rate.

C4733

In view of this situation, we will condition the certificate issued to Texas Eastern so as to require Texas Eastern to file a rate schedule satisfactory to the Commission, fully supported by proper cost data. Such data shall include a system-wide cost of service, and proper allocation thereof between the various services rendered by Texas Eastern, including the proposed transportation service.

THE PRODUCER APPLICATIONS

Hope will itself produce about 4% of the gas supply obtained for this project, and the remainder will be purchased from 21 independent producers under 26 contracts. These contracts call for initial prices of 21¢ per Mcf for about 5% of the volumes dedicated and 21.5¢ per Mcf for the remaining 95%. These prices are exclusive of reimbursement of the Louisiana severance tax. The contracts also call for periodic increases of 1¢ every four years and for price redeterminations after eight years in some cases and after 12 years in others. There are no favored-nation clauses in the contracts, and the evidence clearly discloses that they were made after a long period of arm's-length bargaining. Such contracts with their relatively firm price provisions will not result in any immediate increase in Hope's prices to its customers, and they give Hope the advantage of having fixed purchase prices over a fairly long period of time.

The evidence also shows that the prices in the proposed producer sales will have no adverse effect on any other purchasers in southern Louisiana. The prices to be paid by Hope will set no new plateaus either offshore or in the onshore fields. In fact, numerous unconditioned sales are already being made at and above the proposed prices and many of the contracts therefor call for 2¢ increases every four years and contain favored-nation and redetermination clauses.[3] These are the first purchases by Hope in this area and no favored-nation clauses will be triggered, either to Hope or to other purchasers. The evidence shows that

these sales will only be sufficient to cover normal requirements and additional customers of the Consolidated System for about one year. After 1961, Hope and its affiliates will need even more additional gas supplies to continue to render adequate service.

The only parties to these proceedings who have questioned the producer prices were the Public Service Commission of the State of New York and, quite properly, our own staff. Both insist that these producer sales must be considered in the light of the recent Supreme Court (CATCO) decision in *The Atlantic Refining Company, et al.*, v. *Public Service Commission of New York, et al.*, 79 Sup. Ct. 1249 (decided June 22, 1959), which sets forth

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[3] Our staff's Exhibit No. 32 in this case shows that as of January 1, 1959 there were 61 interstate sales accepted from southern Louisiana at prices ranging from 22.0¢ to 22.9¢ per Mcf, including tax, and 41 at prices between 23.0¢ and 23.9¢, including tax. In the specific parishes in which the sales proposed herein will be made, we have certificated 16 sales at base prices equal to or higher than Hope will pay. Also see, *In the Matters of Trunkline Gas Company, et al.* Opinion No. 321, ... FPC ....., issued May 22, 1959; and *In the Matters of Transcontinental Gas Pipeline Corporation, et al.*, Opinion No. 315, 20 FPC 264, issued September 4, 1958, affirmed as *United Gas Improvement Company, et al.* v. *FPC*, ... F. 2d ....., 3rd Circuit, decided August 4, 1959.

certain elements which should be fully considered in determining whether proposed initial prices for producer sales are in the public interest.

We are in complete accord with the view of the New York Commission and our staff that the prices at which the producers' sales are to be made should be carefully considered and examined in the light of the CATCO decision, and in determining that the producer sales herein proposed should be neither denied nor conditioned we have considered every element required or indicated by the Court.

As we understand the CATCO decision, the Supreme Court held, in essence, that the producer's proposed initial price must be supported by substantial evidence establishing that the price is required by the public convenience and necessity and is in the public interest; that although the Commission should consider all the factors and has broad discretion in determining whether an initial price is so supported, price is an element of prime importance and the Commission should scrutinize the price closely with a view to protecting the consumer and holding the line against price rises. The Court further held that the Commission can attach such price conditions as it believes necessary when the proposed price is out of line, when it might result in a triggering of general price rises by reason of favored-nation clauses, or when its approval might result in a general increase in applicant's existing rates.

The Court did not attempt to prescribe rigidly the quantum of evidence which must be adduced in every case, but indicated what kind of evidence was insufficient; what kind of evidence might or should have appropriately been adduced in consideration of the record there; and thereby, what kind of evidence might or should be adduced in other cases, depending on the factual circumstances present in such cases. Thus, the Court held that evidence of the contract, with little more, is not sufficient to support the issuance of a producer certificate. Evidence which the Court

indicated would have probative value in a given case, even though the necessity for such evidence might depend on the facts of the particular case, includes evidence of comparisons with the weighted average cost of gas to the purchaser; evidence of whether the proposed producer price would lead to an increase in the rates of the purchaser, and evidence in the record of a public need

for the gas. In addition, it appears from the Court's opinion that producer certificate proceedings need not assume the character of rate proceedings under Sections 4 or 5 of the Act.

From our foregoing analysis of the evidence adduced to support the producer prices in this case and the Supreme Court's CATCO decision, it appears that the producer applicants have sustained their burden of showing that the prices are required by the public convenience and necessity, and that there is no adequate basis or reason for denying or conditioning the producer certificates herein sought. As the record shows, the prices are the same or lower than numerous other certificated sales in this area.

The New York Public Service Commission vigorously urges that the effect of the CATCO decision is to require us to deny or condition any producer certificate application for a sale in southern Louisiana in which the price exceeds 18¢ including tax, which price it calls the "pre-Catco" level of price. We do not so interpret the decision of the Supreme Court. As we have stated, our view is that the CATCO case held that we should consider in each case all of the elements of public convenience and necessity, giving particularly careful attention to the element of price, and in the exercise of our sound discretion, decide whether the public interest requires a certificate to issue at the proposed price in such case. We do not read into the opinion any such interpretation as is suggested.

We also disagree with the statement that 18¢ was the "pre-Catco" level of prices in southern Louisiana. True, the majority of the sales in that area were made at prices at or below 18¢, but there were many sales at higher prices. In early 1953 before we took jurisdiction over producer prices, this Commission certificated the Gulf Interstate Gas Company with the knowledge that it was paying producers in southern Louisiana an initial price of 20¢ with fixed escalations each year.[4] In 1954, we certificated producers supplying American Louisiana at 20¢ per Mcf and in October 1955, we certificated producers supplying gas to Texas Gas, one of the parties herein, at a price of 20¢ per Mcf.[5] We have earlier called attention to staff Exhibit 32 in this case, which sets forth other sales made in this area and certificated by us under contracts executed prior to our CATCO decision of June 24, 1957, which were at prices equal to or higher than those applied for herein.

In comparing 1953 and 1954 prices with present prices, we must bear in mind that the natural gas production busi-

ness, like other businesses, has been subject to inflation and increased labor and material costs.[6] Thus, if there has been

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[4] *In the Matter of Gulf Interstate Gas Company*, Docket No. G-2058, 12 FPC 116.

[5] *In the Matter of Atlantic Refining Company, et al.*, Docket No. G-8809. All of the producer prices mentioned with respect to sales to these three pipelines are exclusive of tax.

[6] The U. S. Bureau of Labor Statistics in its report "Employment and Earnings" shows that in 1954 the average hourly wage of production workers in the Crude Petroleum and Natural Gas Production Industries was $2.27 and in May 1959 was $2.80, an increase of 23.3%. The Bureau's report on "Wholesale Prices and Price Index" shows that the wholesale price of finished steel products has risen from 142.8 in 1954 to 186.7 in June 1959, an increase of 30.7%, and the wholesale price of oil field machinery and tools has risen from 129.5 in 1954 to 154.1 in June 1959, an increase of 19%. In computing wholesale prices, the 1947-1949 average was used as a basis of 100.

an increase for natural gas producers in the cost of doing business of 20% between 1954 and 1959, a price of 20¢ in 1954 is comparable to a price of 24¢ in 1959. In making this comparison, we wish to make it clear that we are doing so only for the purpose of showing that a price of 21.5¢ per Mcf, under the circumstances here existing, is not out of line with previously certificated prices when the effects of inflation are considered. We shall consider any new application based upon a price in excess of any price we have heretofore certificated to be "out of line" and shall require conclusive proof from the applicant that the public convenience and necessity requires certification at that price.

In considering whether or not the proposed price is out of line with other prices in the south Louisiana area, we have also taken into consideration the fact that most of the gas here involved is produced either offshore or in the bayous which are almost inaccessible, and where drilling operations are much more expensive than on dry land. We have also taken note of the fact that this gas is obtained from deep horizons which are located at depths of 10,000 to 13,000 feet.

We find nothing in the evidence that signals the existence of a situation which would indicate that the issuance of a permanent certificate is not in the public interest. The proposed price is not out of line with other prices currently being charged in Louisiana, nor, as we have shown, is it out of line with the pre-Catco prices, particularly when we consider the increase in the costs of producing gas, the location of the fields here involved and the depth of the sands from which the gas is produced. Certification at these prices will not result in any triggering, there will be no increase in Hope's existing rates to its customers, nor will there be any increase in the weighted average cost of Hope's gas.

On the contrary, considering the need of Hope for this gas, the fact that it has been unsuccessful in locating gas for its customers in its own exploration activities in south Louisiana and has been unable to purchase any at a lesser price than it is here paying, that the prices will be relatively firm for at least 8, and sometimes for 12 years, that none of its customers have raised any question as to the producer prices and the fact that every other aspect of the public convenience and necessity has been met, we conclude that the public convenience and necessity requires the issuance of the producer applications at the proposed prices. To deny these supplies to Hope would be a disservice to all of the consumers dependent upon it for their gas.

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The Commission further finds:

(1) Hope, Texas Gas and Texas Eastern are natural gas companies as heretofore found by the Commission and each producer applicant is, or will be, upon the commencement of the service authorized herein, a natural gas company within the meaning of the Natural Gas Act.

(2) The facilities described above and more fully described in the applications of Texas Gas in Docket No. G-17335 and Texas Eastern in Docket No. G-17420 will be used for the transportation of natural gas in interstate commerce for resale as integral parts of the pipeline systems of their respective owners, and their construction or reactivation and operation are subject to the requirements of subsections (c) and (e) of Section 7 of the Natural Gas Act.

(3) The delivery points proposed to be established on the Texas Eastern system by Hope will be used for the transportation and sale of natural gas in interstate commerce by Hope and their operation in this manner by Hope

and the sales effectuated thereby are subject to the requirements of subsections (c) and (e) of Section 7 of the Natural Gas Act.

(4) The sales of natural gas by the producer applicants as hereinbefore described, and as more fully described in the applications, will be made in interstate commerce, subject to the jurisdiction of the Commission, and such sales by the producer applicants, together with the construction and operation of any facilities subject to the jurisdiction of the Commission necessary therefor, are subject to the requirements of subsections (c) and (e) of Section 7 of the Natural Gas Act.

(5) Hope, Texas Gas, Texas Eastern and the producer applicants are able and willing properly to do the acts and perform the service proposed and to conform to the provisions of the Natural Gas Act and the Rules and Regulations of the Commission thereunder.

(6) The sales by the producer applicants, the transportation by Texas Gas and Texas Eastern, the sales by Hope and the establishment of delivery points therefor, together with the reactivation or construction and operation of the facilities necessary therefor, are required by the public convenience and necessity and certificates therefor should be issued as hereinafter ordered and conditioned.

(7) The excess compressor facilities, as hereinbefore described, proposed to be reactivated or constructed by Texas Eastern are not shown to be required by the public convenience and necessity and, accordingly, authorization therefor should be denied.

(8) Public convenience and necessity and the orderly administration of the Natural Gas Act requires that the certificates issued herein to Texas Eastern and Texas Gas

be conditioned to require the filing of proper rates satisfactory to the Commission as hereinbefore discussed and as hereinafter ordered.

(9) It is appropriate and in the public interest in carrying out the provisions of the Natural Gas Act that the certificate herein issued to Texas Eastern be conditioned to require the filing of proper accounting entries satisfactory to the Commission as hereinbefore discussed.

The Commission orders:

(A) Certificates of public convenience and necessity are hereby issued to Texas Gas and Texas Eastern to construct or reactivate, as the case may be, and operate the facilities described above and more fully described in the applications in Docket Nos. G-17335 and G-17420 and to transport up to 100,000 Mcf per day of natural gas for Hope, subject to the jurisdiction of the Commission, upon the terms and conditions of this order.

(B) A certificate of public convenience and necessity is hereby issued to Hope to establish delivery points and sell natural gas to its affiliates as hereinbefore described, subject to the jurisdiction of the Commission, upon the terms and conditions of this order.

(C) Certificates of public convenience and necessity are hereby issued upon the terms and conditions of this order, authorizing the sales by the producer applicants of natural gas in interstate commerce for resale, together with the construction and operation of any facilities, subject to the jurisdiction of the Commission, used for the sale of natural gas in interstate commerce, as hereinbefore described and as more fully described in the applications and exhibits in these consolidated proceedings.

(D) The general terms and conditions set forth in paragraphs (a), (b), (c), and (e) of Section 157.20 of the Commission's regulations under the Natural Gas Act shall attach to the issuance of the certificates granted in paragraph (A) hereof and to the exercise of the rights granted thereunder.

(E) The time within which the facilities hereby authorized shall be constructed or reactivated and placed in actual operation as provided in paragraph (b) of Section 157.20 of the Commission's Regulations is hereby fixed at six months from the date on which this order issues.

(F) The certificate issued to Texas Eastern in paragraph (A) hereof shall not be construed to authorize the construction, reactivation or operation of the excess compressor facilities hereinbefore described and authorization to construct or reactivate, and operate those facilities is hereby denied.

(G) The certificate issued to Texas Eastern in paragraph (A) hereof is further conditioned to require Texas Eastern to file a rate schedule applicable to the proposed transportation service satisfactory to the Commission. Such rate schedule shall be filed not less than 90 days prior to commencing service. The company's filing shall be accompanied by satisfactory system data with cost and allocation thereof, supporting the rates for the proposed transportation service, including Mcf-mile study, and based on a rate of return not in excess of 6%, crediting of 50% of applicable Federal income taxes to working capital and a proper classification of costs.

(H) The certificate is further conditioned to require Texas Eastern to file appropriate accounting entries satisfactory to the Commission reflecting the depreciated

original cost of only such of the facilities as are herein authorized to be reactivated.

(I) The certificate issued to Texas Gas in paragraph (A) hereof is further conditioned upon the filing of a proper rate and rate schedule satisfactory to the Commission, to be computed in the manner utilized in hearing Exhibit 11, with the following adjustments thereto:

(1) A 6% rate of return shall be used in lieu of 6¼%,

(2) A credit to the working capital requirement by an amount equal to 50% of Federal income tax related to the return,

(3) Production expense shall be classified 100% to commodity;

and is further conditioned to require that Texas Gas shall not attach any of its own supplies of gas to the authorized gathering facilities without first obtaining the specific approval of this Commission.

By the Commission

JOSEPH H. GUTRIDE,
Secretary.

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BEFORE THE

FEDERAL POWER COMMISSION

Received September 8, 1959

In the Matters of	Docket Nos.
Texas Gas Transmission Corporation	G-17335
Texas Eastern Transmission Corporation	G-17420
Hope Natural Gas Company	G-17565
Texas Gas Exploration Corporation	G-17336
J. Ray McDermitt & Co., Inc.	G-17337
Kilroy Properties Incorporated, *et. al.*	G-17338
The California Company	G-17339
Callery Properties, Inc.	G-17340 and G-17341
Ocean Drilling & Exploration Company	G-17342 and G-17343
Humble Oil & Refining Company	G-17391
Amerada Petroleum Corporation	G-17393 and G-17407
Kerr-McGee Oil Industries, Inc.	G-17396
Bel Oil Corporation	G-17397
Caroline Hunt Sands and Loyd B. Sands	G-17398
Richardson & Bass (Louisiana Account), Operator	G-17399
Magnolia Petroleum Company	G-17401
Beck Oil Company, *et. al.*	G-17402
Phillips Petroleum Company	G-17405
Mississippi River Fuel Corporation	G-17413
Union Oil Company of California	G-17457
Tidewater Oil Company	G-17463, G-17474, G-17475 and G-17483
Continental Oil Company	G-17554 and G-17566
Shell Oil Company	G-17560
Pan American Petroleum Corporation	G-17574

Petition for Rehearing and Reconsideration

of

Opinion No. 327

The Public Service Commission of the State of New York respectfully requests rehearing and reconsideration of the Commission's Opinion No. 327, issued herein on August 10, 1959.

Therein, the Commission authorized the issuance of certificates of public convenience and necessity, unconditioned as

C4748

to price, to 21 producer-applicants. Thereby, it approved 26 more sales of natural gas in Southern Louisiana at initial prices ranging from 23.05¢ to 23.55¢ per Mcf.*

We raise no objection to any other aspect of the proposals considered in Opinion No. 327. We raise no objection to the certification of the sales *per se*. We object only to the Commission's doing so without limiting or conditioning the initial price at a level *per se* no higher than that demonstrated to be required by the public convenience and necessity.

Point I

The Commission's Determination Is Not in Accord With The Supreme Court's CATCO Decision. It Undermines It.

CATCO** went to the Supreme Court for one reason and one reason only—to prevent the second, major, post-*Phillips* elevation of the Southern Louisiana initial price level from 18¢ to 22.4¢ unless such was demonstrated, by preponderant proof, to be required by the public conven-

ience and necessity. It was not so demonstrated in that case. It was not in any

of those CATCO engendered—the June 1957 to June 1959 halcyon "automatic-prima-facie-case" days. It has not been here.

In CATCO, the Supreme Court noted with critical disapproval that the CATCO certifications would and in fact had (without justification) become the floor for all future contract negotiations, and certifications as well, in Southern Louisiana. The case is to be remanded for *rectification* of the latter unfortunate circumstance. The "line" the Court adjured must be held—barring preponderant demonstration of the necessity for elevating it—was the pre-CATCO line—not the CATCO line itself or that established by any of its equally deficient progeny.

That the Commission is now aware that it is supposed to hold to *some* line, it has demonstrated in Opinion No. 327:

> "We shall consider any new application based upon a price in excess of any price we have heretofore certificated to be 'out of line' and shall require conclusive proof from the applicant that the public convenience and necessity requires certification at that price." Mimeo ed., p. 13.

That's fine. But the Commission has been advised by the Supreme Court that it will in due course be in receipt of an order of that Court, which will adjure it to "require conclusive proof from the applicant that the public convenience and necessity requires certification" at *any* price, and par-

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* The "base prices" range from 21¢ to 21.5¢ per Mcf. However, totally unobserved by the Commission, the contracts obligate Hope, the purchaser, to pay 2.05¢ more to the producers for every Mcf acquired, representing the producer's Louisiana severance taxes.

** *Atlantic Refining Company, et al.* v. *PSC of New York, et al.*, 360 U.S. 378 (1959).

ticularly at any in excess of 18¢—the pre-CATCO going rate. Accordingly, the Commission's newly (above) discovered and espoused policy

C4750

starts precisely 6¢ too high (24 minus 18).*

Point II

The Demonstration That Public Convenience and Necessity Require Certification of These Sales At The Initial Price Proposed is Wholly Inadequate. In Major Part, it is Imaginary and Totally Unsupported by Evidence of Record.

The proof produced of record in support of these applications demonstrates not one whit more of substance than was the case in CATCO and the case in every single certification proceeding since 1954. Not a single one of them measures up to the Supreme Court's CATCO standards for the demonstration of public convenience and necessity which would warrant an 18¢-plus certification.

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* In Opinion No. 327 the Commission presumes to contradict the Supreme Court in its depiction of 17-18¢ as the pre-CATO level. That was certainly Tennessee's pre-CATCO level. That was certainly Transcontinental's pre-CATCO level. That was certainly Texas Eastern's pre-CATCO level. That was certainly the predominant level for the overwhelming majority of contracts and certifications negotiated and issued immediately prior to CATCO. It requires no extended belaboring to demonstrate that the Commission's three cited instances of higher (20¢), pre-CATCO certifications (Mimeo., p. 12)—i.e. Gulf Interstate, American Louisiana and Texas Gas—were the exceptions; *sui generis;* erroneous, by any standard; and, by reason thereof, not even influential in the negotiations for the great majority of sales in the pre-CATCO market. Of them, the Supreme Court was aware when it took note of the predominant, going, 17-18¢ pre-CATCO price level. It ill behooves the Commission now to cite these three instances of even more drastic deviation from the requirements of the Natural Gas Act than was its action in CATCO, as the basis for its "disagreement" with the Supreme Court in this respect.

C4751

1. *Factors other than initial price.* In Opinion No. 327 the Commission first takes note that the contracts were negotiated at "arm's length". This is, of course, a prerequisite of any certification. It is not justification therefor.

It is then noted that there are no favored nations clauses in the contracts and that the provisions for periodic price escalations and redeterminations—to ensue later, in the words the Commission frequently uses, "only with Commission approval"—are less drastic *per se* than others customarily encountered. That is encouraging too—but it is the matter of *initial* price which is here of "prime importance" and "crucial" (in the words of the Supreme Court).

2. *The effects of unconditional certification.* Next, we are advised by Opinion No. 327 that since there have been many unconditional certifications already extended in Southern Louisiana, in the 23¢ price range, these 26 more cannot adversely affect other purchasers—no new price plateau is established thereby. True, too true. But the Commission has now been advised by the Supreme Court that the basis for those certifications was entirely lacking (Point I, *supra*). Further repetition of that error in the face of that advice mere serves to compound the error.

Next, we are advised that the impact of these acquisitions upon Hope, the purchaser, will not be deleterious since (a) they will not "trigger" any other Hope contracts, (b) they will not increase Hope's weighted average cost of gas and (c) therefore,

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there will be no "immediate" increase in Hope's charges to its customers.

The Commission was advised by its staff "that the cost of transportation gas that is proposed in this proceeding far exceeds the prices presently being paid by Hope for any of its purchased gas supplies from unaffiliated companies." (Staff Brief, p. 78) Starting with the 23¢ purchase price and adding the transportation costs here involved, we get the gas to Hope at its delivery points in the Northeast at a cost of some 45¢ (Item EE). At these points the cost to Hope of the other pipeline gas Hope delivers approximates 36¢ (R. 1559). Hope now sells to its customers at 48-50¢ (R. 1549) and one of its witnesses presumes to testify that it proposes to continue to do so! That these purchases do not serve to increase Hope's average cost of gas and that there will be no increases in Hope's price are both, perforce, fanciful illusions and self-refuting. In any event, there is absolutely no reliable record support for the assertions.

3. *The initial prices per se.* The Commission faces up to the 23¢ directly in three respects only, each of which is totally unsupported of record. Opinion No. 327 states in part:

> "In comparing 1953 and 1954 prices with present prices, we must bear in mind that the natural gas production business, like other businesses, has been subject to inflation and

> "increased labor and material costs.[6] Thus, if there has been an increase for natural gas producers in the cost of doing business of 20% between 1954 and 1959, a price of 20¢ in 1954 is comparable to a price of 24¢ in 1959. In making this comparison, we wish to make it clear that we are doing so only for the purpose of showing that a price of 21.5¢ per Mcf, under the circumstances here existing, is not out of line with previously certifi-

cated prices when the effects of inflation are considered. Mimeo. ed., p. 12, *et seq.*

[6] The U.S. Bureau of Labor Statistics in its report "Employment and Earnings" shows that in 1954 the average hourly wage of production workers in the Crude Petroleum and Natural Gas Production Industries was $2.27 and in May 1959 was $2.80, an increase of 23.3%. The Bureau's report on "Wholesale Prices and Price Index" shows that the wholesale price of finished steel products has risen from 142.8 in 1954 to 186.7 in June 1959, an increase of 30.7%, and the wholesale price of oil field machinery and tools has risen from 129.5 in 1954 to 154.1 in June 1959, an increase of 19%. In computing wholesale prices, the 1947-1949 average was used as a basis of 100."

This trending of prices utilized by the Commission is a creation of its own imagination. None of the parties to the proceeding offered any evidence on the subject, utilized or even mentioned such a method to justify price. Apart therefrom, the

approach itself is faulty. The Commission *starts* with a 20-cent price per Mcf in 1954—a price which was the exception rather than the rule, pre-CATCO; one which has never been justified as required by the public convenience and necessity in accordance with the CATCO principles; and one which certainly has never been justified as a "just and reasonable" rate—and trends *that* price upward because of inflation. The result is to perpetuate to the same extent the inequities and infirmities that were reflected by the 20-cent charge, first made in isolated sales in 1954. We think that the 20% inflationary experience might possibly be trended against 1954's predominantly going rate of 8-10¢ in Southern Louisiana. *That* might prove something. The Commission's comparison, however, is merely "bootstrapism" with a vengeance.

The Commission also states:

> "In considering whether or not the proposed price is out of line with other prices in the south Louisiana

area, we have also taken into consideration the fact that most of the gas here involved is produced either off shore or in the bayous which are almost inaccessible, and where drilling operations are much more expensive than on dry land. We have also taken note of the fact that this gas is obtained from deep horizons which are located at depths of 10,000 to 13,000 feet." Mimeo ed., p. 13.

There is no evidence in the record as to the comparative cost of drilling on-shore or off-shore or at depths of 10,000 to 13,000 feet. More importantly, however, there is no evidence in the record to indicate the relationship of such factors to the

proposed prices or any others charged in Southern Louisiana, or whether these factors played any part in the determination of the prices here proposed. Needless to say, it is also improper to isolate single factors which might justify portions of the prices, in terms of cost, without justifying the total amount being charged in the same terms.

Neither is it readily apparent why evidence of the depths at which drilling will take place becomes significant in this proceeding, for the first time. The only other case, to our knowledge, in which this factor was deemed of materiality was *Transwestern Pipeline Co., et al.*, Docket Nos. G-14871, *et al.* In Opinion No. 328 (Transwestern), issued coincidentally with Opinion No. 327, it would appear from Commissioner Hussey's dissent, that the majority of the Commission apparently does not believe that, by itself, evidence of the depth at which drilling is to take place is of particular significance. We do not think it is either except in connection with a complete (actual) not partial (theoretical) examination of the producer's cost of service. (Mimeo. ed., Dissent, p. 2.)

4. *The conclusory rationale.* The Commission concludes with observations which would appear to comprise the real bases for its refusal to exercise its price limiting and conditioning powers in the manner the Supreme Court assured might be done upon a record such as this (in lieu of the out-right denial otherwise required).

C4756

> "On the contrary, considering the need of Hope for this gas, the fact that it has been unsuccessful in locating gas for its customers in its own exploration activities in South Louisiana and has been unable to purchase any at a lesser price than it is here paying, that the prices will be relatively firm for at least 8, and sometimes for 12 years, that none of its customers have raised any question as to the producer prices and the fact that every other aspect of the public convenience and necessity has been met, we conclude that the public convenience and necessity requires the issuance of the producer applications at the proposed prices. To deny these supplies to Hope would be a disservice to all the consumers dependent upon it for their gas." Mimeo ed., p. 13.

Of course Hope "needs" the gas—i.e., needs it to permit of its sale of larger quantities to satisfy the Consolidated System's legitimate desire to distribute more gas to more people. Every gas purchaser, such as Hope, has such needs or it would not appear before the Commission in a proceeding such as this. Neither we nor anyone else insists that it should not be permitted to acquire more supplies for this purpose—at prices which will not further anchor the totally unsupported (to date) 24¢ price level more firmly into the Southern Louisiana market.

Of course Hope was unable to purchase (i.e., negotiate contracts for) gas at a lesser price than it is here committed to pay. The Commission's now discredited (by the Supreme Court) certification practices of the recent past

has brought this about. It is this state of affairs that the Court indicated must be rectified. The going negotiated price level is *not* to continue to be compelling of the going certificated price level as has been the case far too long.

C4757

Neither is it surprising that none of Hope's customers has raised any question as to the producer prices here involved. In the first place, each and every one of them is a sister Consolidated Natural System confrere of Hope's. In the second place, they are also in the business of selling gas and properly wish to do so and continue to expand. They too recoup their costs of gas acquisitions from ever-increasing rates. And those that have reacted responsibly in the past to repeated, unjustified producer price spirals in proceedings before the Commission, have received little by way of reward for their efforts. Banging one's head against a stone wall becomes monotonous in time.

Then finally we reach the clincher. "To deny these supplies to Hope would be a disservice to all of the consumers dependent upon it for gas." Though unsupported of record, that may be conceded. But upon what record evidence or factual basis does the Commission reach the conclusion that it must "deny these supplies" to Hope, as the only alternative to an unconditional grant of the applications as presented? Gas flowed in large quantities to the interstate market at 10¢ in 1954. It flowed in even greater quantities at 17-18¢ in 1957. Had the Commission then (e.g., in CATCO) held the line, that gas, and we and the Supreme Court are quite certain, additional gas supplies would have continued to flow to that market. Pursuit of the Commission's price conditioning powers *consistently,* in the manner CATCO contemplates, will not "deny" supplies. At the very least, the Commission might better *prove* rather than *assume* the

contrary before declining to administer the Natural Gas Act in the manner the Supreme Court has made abundantly clear is required.

CONCLUSION

Under CATCO, the Commission has two and only two alternatives in the discharge of its statutory obligations in these proceedings. (1) It may issue conditional certificates to the producers, approving of the sale of the gas here involved at a price no higher than that demonstrated to be required by the public convenience and necessity; or (2) it must deny the applications for lack of proof. We urge the Commission to reconsider its Opinion No. 327 and thereupon to pursue course No. 1.

Respectfully submitted,

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK

/s/ By Kent H. Brown
KENT H. BROWN
Counsel
55 Elk Street
Albany 1, New York

Dated: September 4, 1959
LAWRENCE M. DEVORE
Of Counsel

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GAS PURCHASE CONTRACT

BETWEEN

THE SUPERIOR OIL COMPANY

SELLER

AND

UNITED GAS PIPE LINE COMPANY

BUYER

Terrebonne Parish, Louisiana

EXHIBIT "B"

D200

Gas Purchase Contract

THIS CONTRACT made and entered into as of the 8th day of September, 1958, by and between THE SUPERIOR OIL COMPANY, a corporation, hereinafter designated as Seller, and UNITED GAS PIPE LINE COMPANY, a corporation, hereinafter designated as Buyer;

WITNESSETH:

WHEREAS, Seller is the owner of certain leaseholds and/or interests in leaseholds in the Bayou Penchant, Palmetto Bayou and Four Isle Dome Fields, Terrebonne Parish, Louisiana, and has, or will have, a supply of gas available for sale which is produced from such leaseholds and/or interests in leaseholds, hereinafter called leaseholds; and

WHEREAS, Buyer operates a gas pipe line system serving various markets and Buyer desires to purchase gas from Seller to supply a portion of Buyer's gas requirements;

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Now, Therefore, in consideration of the premises and of the mutual covenants and agreements herein contained, the parties hereto covenant and agree as follows:

I.

Subject to all of the terms, conditions and limitations hereinafter set forth, Seller hereby sells and agrees to sell and deliver to Buyer, and Buyer hereby agrees to purchase and receive from Seller in the usual conduct of Buyer's business, at the hereinafter described delivery points, merchantable gas in the quantities hereinafter set forth, produced from all leaseholds now owned by Seller in the Bayou Penchant,

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Four Isle Dome and Palmetto Bayou Fields, Terrebonne Parish, Louisiana, as such fields now exist or as they may hereafter be extended or enlarged during the term of this contract, but only from those formations or reservoirs located between the surface of the ground and the base of the deepest productive reservoir heretofore discovered in the respective fields above mentiond.

The deepest productive reservoirs heretofore discovered in the respective fields are identified as follows:

(1) Bayou Penchant Field—The reservoir as found on the electrical log of Seller's No. A-9 La Terre Well in Section 11, Township 19 South, Range 13 East, Terrebonne Parish, Louisiana, between 14,890 feet and 14,914 feet.

(2) Four Isle Dome Field—The reservoir as found on the electrical log of Seller's No. 1 Terrebonne Parish School Board Well in Section 16, Township 21 South, Range 16 East, Terrebonne Parish, Louisiana, between 16,730 feet and 16,866 feet.

(3) Palmetto Bayou Field—The reservoir as found on the electrical log of Seller's No. B-1 La Terre Well

in Section 6, Township 19 South, Range 13 East, Terrebonne Parish, Louisiana, between 14,286 feet and 14,304 feet.

so that all formations and reservoirs in a respective field below the base of the applicable reservoir above identified are hereby excluded from this contract and not committed hereunder.

The obligation of Seller to sell and deliver such gas is subject, however, to the reservation by Seller of sufficient gas for:

(1) The development and operation of Seller's leaseholds in the above mentioned fields, including gas for pressure maintenance or repressuring of oil or condensate producing horizons underlying Seller's leaseholds covered hereby in order to increase the ultimate recovery of oil or condensate;

(2) The operation of any gasoline or dehydration plant

or compressor station operated by or on behalf of Seller on its leaseholds in the above mentioned fields;

(3) The supplying to Seller's lessors of gas to which such lessors are entitled under the terms of Seller's leases in said fields which cover leaseholds covered hereby; and

(4) The performance of its obligations under that certain contract with Tennessee Gas Transmission Company dated April 6, 1955, as such is affected by the reserve determination agreement dated April 1, 1958, accepted April 10, 1958, copy of each of which has been exhibited by Seller to Buyer, it being further agreed that Seller shall not be obligated to deliver to Buyer any gas from reservoirs or portions thereof discovered on or before October 9, 1957, which underlie the respective areas outlined in red on Exhibits "A" and "B" of said agreement of April 1, 1958, which such reservoirs or such portions thereof, to the extent

that such reservoirs or such portions thereof are located within the respective areas outlined in red on Exhibits "A" and "B", Seller reserves for the performance of the contract with Tennessee Gas Transmission Company. If such reservoirs or portions thereof within the area outlined in red on Exhibits "A" and "B" of said agreement of April 1, 1958, be insufficient to enable Seller to perform its contract with Tennessee Gas Transmission Company to the extent that the gas from other reservoirs be required for its performance, Seller shall have the right to use and deliver gas from any reservoir herein committed to Buyer for the performance of its contract with Tennessee Gas Transmission Company.

Seller shall have the right to operate its properties free from any and all control by Buyer in such a manner as Seller in its sole discretion may deem advisable, including, without limitation, to the right to drill new wells, to repair and rework old wells, renew or extend in whole or in part any leases covered hereby, and to abandon any well or surrender any lease, in whole or in part.

Seller shall have the right, at its option, at any time and from time to time during the term of this contract, to include under the terms and provisions of this contract any leaseholds or formations and reservoirs not presently covered hereby which are located in any

of the above described fields. In such event, Seller shall deliver and Buyer shall receive the gas deliverable from such leaseholds or formations and reservoirs throughout the then remaining portion of the term covered by this contract in accordance with all of the terms and provisions hereof, except Buyer shall be allowed the period of time which is required to construct the necessary facilities to receive such gas before Buyer shall be obligated to take or pay for such gas under the provisions hereof.

Seller also reserves the right to pool and combine all or any part of the leases subject hereto with other properties owned by Seller or others, including the right to reform units; in which event this contract shall extend and apply to the interest of Seller in the newly formed unit to the extent that such interest is derived from the leaseholds covered hereby.

II.

It is recognized that Seller shall deliver gas to Buyer hereunder from various nonrelated fields, and that such gas shall be received by Buyer at separate delivery points located in each of said fields. It is expressly agreed between Seller and Buyer that, under the provisions hereinafter set forth in this Article II, Seller's obligation to deliver and Buyer's obligation to receive gas hereunder shall be determined separately for each of the fields covered hereby so that there will be a separate Annual Minimum Quantity in effect for Seller's leaseholds in each of such fields, and no excesses or deficiencies in Seller's delivery or Buyer's receipt of gas from any one field covered hereby shall be considered in determining the parties' respective obligations for delivery and receipt of gas from any of the other

fields covered hereby.

Buyer shall take from Seller hereunder or pay Seller for, whether taken or not, during each "contract year," as same is hereinafter defined, quantities of gas which are at least equal to the Annual Minimum Quantity during such contract year, provided that Seller is able to make deliveries of such Annual Minimum Quantity in accordance with the provisions hereof, and further, Buyer shall take from Seller, or pay Seller for whether taken or not, during each month throughout each contract year, a quantity of gas which is

not less than one-twenty-fourth (1/24) of the Annual Minimum Quantity in effect for such contract year. For the purposes hereof the term "Annual Minimum Quantity" shall mean a quantity of gas equal to forty-five million, six hundred twenty-five thousand (45,625,000) cubic feet of gas per contract year for each billion cubic feet of Seller's Gas Reserves. The term "Gas Reserves" as used herein shall mean the estimated total quantity of recoverable gas owned by Seller and contained in the various gas-bearing formations or reservoirs underlying Seller's leaseholds which are subject to the terms of this agreement, less the Gas Reserves which Seller has reserved under Article I hereof and are excepted from this contract. Such Gas Reserves shall be determined in accordance with the provisions of Article IV of this agreement.

Seller agrees that it will develop and maintain sufficient delivery capacity to enable it to deliver to Buyer hereunder, on each day throughout each contract year, a quantity of gas which is equal to one and one half (1½) times the daily average of the Annual Minimum Quantity in effect for such contract year. In the event that Seller should, at any time

during any contract year, fail or be unable to develop, or having developed, to maintain, sufficient delivery capacity to enable it to deliver to Buyer hereunder the daily quantity of gas provided for in this paragraph; then the Annual Minimum Quantity for the remainder of such contract year shall be reduced by the ratio that the smallest quantity of delivery capacity maintained by Seller during such contract year bears to the quantity of delivery capacity required to enable Seller to deliver, on any day, one and one half (1½) times the daily average of the Annual Minimum Quantity then in effect; provided that in the event Seller's delivery capacity shall be insufficient and the Annual Minimum

Quantity shall as a result be subject to reduction and Seller, by further development or other operations during such contract year increases its delivery capacity, then for such contract year the Annual Minimum Quantity shall be computed on a pro rata basis using the various quantities of delivery capacity that were available during such contract year. In the event of any such reduction of the Annual Minimum Quantity for any contract year, Buyer shall take from Seller, or pay Seller for whether taken or not, during each month of such contract year, a quantity of gas which is not less than one-twenty-fourth (1/24) of such reduced Annual Minimum Quantity.

It is expressly understood that Buyer shall have the right and option to purchase at any time and from time to time, such daily quantity of gas as it desires up to one and one half (1½) times the daily average of the Annual Minimum Quantity then in effect, and in addition, such daily quantities of gas, if any, in excess of one and one half (1½) times the daily average of the Annual Minimum Quantity which in Seller's judgment

can be produced and delivered from Seller's wells efficiently and in accordance with good operating practices. It is recognized that Seller is not obligated to provide processing facilities for quantities of gas in excess of one and one half (1½) times the daily average of the Annual Minimum Quantity in effect from time to time, and therefore any additional gas which Buyer may elect to receive under this paragraph, which is in excess of the capacity of Seller's processing facilities as then installed shall be by-passed by Seller around such facilities and the quality specifications of Article VIII shall not apply to such excess quantity which is so by-passed.

In the event Seller has developed its leaseholds covered

hereby to the extent permitted by the rules and regulations of the regulatory body having jurisdiction, and Buyer's withdrawals of gas hereunder, over periods of reasonable duration, are insufficient to provide Seller with a ratable share of the total withdrawals by all producers in any field covered hereby, then Seller may call upon Buyer to increase its withdrawals hereunder from such field to the extent necessary to enable Seller to produce its current ratable proportion of the total withdrawals of gas from such field, and in addition thereto, such quantities of gas as may be necessary to enable Seller to produce, over a reasonable period of time, any accumulated net deficiencies which may have occurred, since the date that Seller had such delivery capacity available, in Buyer's prior withdrawals of gas from Seller hereunder from such field. In the event that Buyer, after receipt of such request from Seller, does not increase its withdrawals hereunder in such field to the extent necessary to enable Seller to produce such current ratable quantities of gas, and, over a reasonable period of time, any such accumu-

lated net deficiency which may exist, then Buyer shall, upon request from Seller, release from this contract sufficient gas reserves in such field to enable Seller to take steps to correct such situation.

It is recognized that neither Seller nor Buyer desires to construct the necessary facilities to enable Seller to deliver and Buyer to receive the gas deliverable hereunder from the Four Isle Dome Field at the delivery point provided in Article III hereof until Seller has had an opportunity to determine whether Seller can develop in said field for delivery hereunder Gas Reserves which equal or exceed fifty (50) billion cubic feet. Accordingly, it is agreed between Seller and Buyer that, (i) until Seller and Buyer have

completed the construction of the necessary facilities to enable Seller to deliver and Buyer to receive gas from the Four Isle Dome Field at the delivery point provided in said Article III or (ii) the leaseholds covered hereby which are located in said field are released from this contract, whichever (i) or (ii) occurs under the provisions hereinafter set forth in this paragraph, Buyer shall take, or pay for if not taken, from reservoirs wholly owned by Seller in the Bayou Penchant and Palmetto Bayou Fields, in addition to the quantities of gas hereinabove provided for in this Article II, additional quantities of gas which are at least equal to the quantities of gas which Buyer would otherwise be obligated to take, or pay for if not taken, in accordance with the foregoing provisions of this Article II if deliveries of gas were being made by Seller to Buyer from the Four Isle Dome Field. It is expressly

agreed that Buyer's obligation to take, or pay for if not taken, such additional quantities of gas from reservoirs wholly owned by Seller in the Bayou Penchant and Palmetto Bayou Fields is subject to Seller's ability to deliver one and one half (1½) times the daily average of such additional quantities of gas on each day throughout each contract year this paragraph is in effect, and the provisions hereinabove set forth in this Article II relating to the determination of Seller's delivery capacity and Buyer's obligation to take, or pay for if not taken, the Annual Minimum Quantity shall apply in determining Seller's delivery capacity and Buyer's obligation with regard to such additional quantities of gas. Should Seller develop for delivery hereunder in the Four Isle Dome Field Gas Reserves which equal or exceed fifty (50) billion cubic feet within three (3) years from the date deliveries of gas commence under this contract, then Seller and Buyer shall proceed with reason-

able diligence in obtaining the necessary certificates from the Federal Power Commission in accordance with the provisions of Article III and thereafter construct the necessary facilities to enable Seller to deliver and Buyer to receive gas from the Four Isle Dome Field at the delivery point provided in Article III. On the other hand, if Seller has not developed for delivery hereunder in the Four Isle Dome Field Gas Reserves which equal or exceed fifty (50) billion cubic feet within said three (3) year period, then Buyer may, at its option, elect to construct the necessary facilities to receive gas from Seller from the Four Isle Dome Field at the delivery point provided in Article III. If Buyer so elects, Seller and Buyer shall proceed with reasonable diligence in obtaining the necessary certificates from the Federal

Power Commission in accordance with the provisions of Article III and thereafter construct the necessary facilities to enable Seller to deliver and Buyer to receive gas from the Four Isle Dome Field at the delivery point provided in Article III, but if Buyer does not elect to construct such facilities, then Buyer shall release from this contract those leaseholds covered hereby which are located in the Four Isle Dome Field.

If during any contract year Buyer pays for gas which is not taken in accordance with the provisions hereof, Buyer shall have the right during the next succeeding contract year to make up such deficiency in takings by crediting such excess payments against quantities of gas taken during such succeeding contract year and which are in excess of the Annual Minimum Quantity for such succeeding contract year, but in making up such deficiencies Buyer shall be required to pay to Seller any difference in the price prevailing for the contract year in which the deficiency is

made up and the price paid for gas not taken during the contract year when the deficiency occurred.

III.

Seller agrees to deliver and Buyer agrees to receive the gas deliverable hereunder at one mutually agreeable central point in each of the fields covered hereby, which such points shall constitute the delivery

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points for all gas deliverable hereunder. Seller agrees to construct, operate and maintain, at its expense, the necessary facilities from Seller's wells to said delivery points. Buyer agrees to construct, at its expense, the necessary pipe lines from its existing pipe line system to said delivery points, which said pipe lines may also be used by Buyer to transport gas received from other parties and other sources. It is expressly understood and agreed, however, that Seller's obligation to deliver and Buyer's obligation to receive gas at the delivery point provided for in the Four Isle Dome Field is subject to the provisions hereinabove set forth in Article II hereof.

It is recognized that it shall be necessary for Seller to obtain Certificates of Public Convenience and Necessity from the Federal Power Commission for each field covered hereby prior to the commencement of deliveries of gas hereunder from such fields. It is further recognized that it shall be necessary for Buyer to obtain a Certificate of Public Convenience and Necessity from the Federal Power Commission for the Four Isle Dome Field prior to the receipt by Buyer of gas from Seller hereunder from said field. Seller will, as soon as practicable after the execution of this contract, file and prosecute diligently its application or applications for Certificates of Public Convenience and Necessity authorizing Seller to initiate and continue the sale of

gas hereunder from the Palmetto Bayou and Bayou Penchant Fields. Seller and Buyer will, when it is determined as hereinabove provided in Article II whether Seller shall deliver and Buyer shall receive gas from the Four Isle Dome Field, file

and prosecute diligently their respective applications for Certificates of Public Convenience and Necessity which, in the case of Seller, shall authorize it to initiate and continue the sale of gas hereunder from the Four Isle Dome Field, and which, in the case of Buyer, shall authorize it to construct and operate the facilities required to receive and transport said quantities of gas from the Four Isle Dome Field.

Notwithstanding the foregoing provisions hereof, neither Seller nor Buyer shall be obligated to accept any Certificate of Public Convenience and Necessity authorizing the sale or purchase of gas hereunder in any field covered hereby, which certificate contains conditions that are not acceptable to the party to whom such certificate is issued. In the event Seller has not obtained and accepted the Certificates of Public Convenience and Necessity which would authorize Seller to sell gas under the provisions of this contract in the Palmetto Bayou and Bayou Penchant Fields within twelve (12) months from the date Seller files for its respective Certificates of Public Convenience and Necessity for such fields, then Seller shall have the right, at any time prior to the receipt of an acceptable certificate, to cancel this contract insofar as this contract relates to the applicable field for which Seller has not obtained and accepted such certificate by giving written notice thereof to Buyer. Also, in the event the Certificates of Public Convenience and Necessity relating to the sale and purchase of gas in

the Four Isle Dome Field have not been issued and accepted by both parties hereto within twelve (12) months from the date of filing of the last application of the parties for such certificates, then either party hereto shall have

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the right, at any time prior to the receipt of acceptable certificates by both parties, to cancel this contract as to the Four Isle Dome Field by giving written notice thereof to the other party. Seller and Buyer shall, within ten (10) days after the receipt of its respective Certificates of Public Convenience and Necessity from the Federal Power Commission in each field covered hereby, notify each other whether such party shall accept such certificate.

Seller and Buyer agree to proceed with reasonable diligence in the construction of the necessary facilities to enable Seller to deliver and Buyer to receive gas hereunder from each field covered hereby as soon as the applicable Certificates of Public Convenience and Necessity relating to each field has been obtained and accepted by the parties hereto in accordance with the foregoing provisions hereof Deliveries of gas shall commence hereunder from each field covered hereby when Seller and Buyer have completed the construction of the facilities required to enable Seller to deliver and Buyer to receive gas from such field.

IV.

Seller and Buyer agree that for the purpose of this agreement Seller's Gas Reserves shall be determined in accordance with the following provisions:

Upon execution of this agreement, Seller shall, using its best judgment, estimate its Gas Reserves separately for each field covered

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hereby and furnish such estimate to Buyer. From such estimate, Buyer and Seller shall attempt to agree upon the total quantity of Seller's Gas Reserves in each field covered hereby: In the event that no agreement is reached as to the total quantity of such Gas Reserves in each field covered hereby, the parties agree to submit the matter to arbitration in accordance with the provisions of Article XV hereof. At any time prior to the date deliveries of gas commence hereunder, either party may request a redetermination of the amount of Seller's Gas Reserves by serving notice of its desire to have such redetermination upon the other party. Said redetermination shall include the producing horizons covered by the first agreement as to reserves, all additions and extensions to them, all other sources of Seller's Gas Reserves in and under the leaseholds which are subject to this agreement and any other related factors. In the event no agreement is reached as to the total quantity of Seller's Gas Reserves within sixty (60) days from the date of notice of desire to have a redetermination, then the amount of said Gas Reserves shall be redetermined by arbitration in accordance with the provisions of Article XV hereof. After deliveries of gas commence hereunder, additional redeterminations, to be made in the same manner as set out above, may be requested by either party from time to time, but in no event shall any redetermination, except by mutual agreement of the parties hereto, be requested sooner than twelve (12) months after the date of the last redetermination.

All reserve determinations which are made in accordance with

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the foregoing provisions of this Article IV shall be made, adjusted and determined as of the date of initial deliveries

of gas under this contract, but any changes in Seller's Gas Reserves which may occur as a result of any redetermination of said Gas Reserves under the provisions of this contract shall be effective for the purpose of determining the Annual Minimum Quantity only from and after the date of such redetermination or redeterminations. The original determination and any redeterminations of Seller's Gas Reserves shall be stipulated in writing and signed by both parties hereto.

If the determination be made during a contract year and a change in the Annual Minimum Quantity results, the Annual Minimum Quantity for such contract year shall be computed on a prorata basis using the values of reserve effective before and after the date of such reserve redetermination.

V.

Seller agrees to install and operate equipment and facilities to enable Seller to deliver the gas deliverable hereunder, at the above described delivery points, at a pressure sufficient to enter Buyer's pipe line against the working pressures maintained therein from time to time, but not in excess of twelve hundred (1200) pounds per square inch gauge. Notwithstanding the foregoing provisions hereof, should the natural flowing pressure of any of Seller's wells decline to the extent that Seller, after meeting the quality specifications set forth in subparagraph (a) of Article VIII hereof, is unable to deliver such gas at

pressures up to a maximum pressure of twelve hundred (1200) pounds per square inch gauge, then Seller shall only be obligated to deliver such gas at pressures up to a maximum pressure of one thousand (1,000) pounds per square inch gauge.

In the event that compression should be necessary in order for the gas deliverable hereunder to be delivered at the required pressure, Seller shall have the option to install and operate compressors at its sole cost and expense, and in the event Seller does not elect to install compressors, then Buyer shall have the right to install and operate compressors at its sole cost and expense. However, it is expressly understood and agreed that neither party hereto shall be obligated to compress any gas under the terms of this contract.

VI.

At or near each delivery point hereunder, Buyer shall provide, operate and maintain, at its expense, a measuring station properly equipped with orifice meter or meters of standard type for the measurement of gas delivered to Buyer hereunder. Seller shall have access to the measuring equipment at all reasonable times, but readings, calibrations and adjustments thereof, and changing of charts shall be done by the employees or agents of Buyer. Buyer shall keep said measuring equipment accurate and in repair, making tests quarterly or as much oftener as Buyer may deem necessary. Buyer agrees to give Seller reasonable notice of such tests of Buyer's equipment so that if Seller desires Seller may have its representative present. Seller shall have the right to challenge the accuracy of said equipment, and when challenged, the equipment shall be tested and repaired by Buyer; the cost of such special test to be borne by Buyer if the percentage

of inaccuracy is found to be more than two per cent (2%), but if the percentage of inaccuracy is found to be two per cent (2%) or less, the cost of such special test shall be borne by Seller. If, upon any test, the percentage of inaccuracy of the measuring equipment is found to be in excess of two

per cent (2%), registrations thereof shall be corrected for a period extending back to the time such inaccuracy occurred, if such time is ascertainable, and if not ascertainable, then back one half of the time elapsed since the last date of calibration. The charts and records from such measuring equipment shall remain the property of Buyer and shall be kept by Buyer on file for a period of not less than one year. At any time within one year from the date Buyer removes the charts from its measuring equipment, Buyer shall, upon request of Seller, submit to Seller records and charts from its measuring equipment, together with calculations therefrom, for Seller's inspection and verification subject to return by Seller within twenty (20) days from receipt thereof.

If, for any reason, meters are out of service or out of repair so that the amount of gas delivered cannot be ascertained or computed from the readings thereof, the gas delivered during the period such meters are out of service or out of repair shall be estimated and agreed upon by the parties hereto upon the basis of the best data available, using the first of the following methods which is feasible:

(a) By using the registration of any check meter or meters if installed and accurately registering;

(b) By correcting the error if the percentage of error is ascertainable by calibration, test or mathematical calculation;

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(c) By estimating the quantity of delivery by deliveries during preceding periods under similar conditions when the meter was registering accurately.

Seller may, at its option and expense, install and operate check meters to check Buyer's meters, but measurement of

gas for the purpose of this agreement shall be by Buyer's meters only, except in cases hereinabove specifically provided to the contrary. Check meters shall be either the orifice or volumetric type and shall be subject at all reasonable times to inspection or examination by Buyer, but the reading, calibration and adjustment thereof and changing of charts shall be done only by Seller.

VII.

All gas delivered hereunder shall be measured in accordance with the basis of measurement provided for in the Standard Gas Measurement Law known as Act 479 of the Regular Session of the Louisiana Legislature, 1950, R. S. 55:151-156.

A "cubic foot of gas" for the purpose of measurement of the gas delivered by Seller to Buyer hereunder is the amount of gas necessary to fill a cubic foot of space when the gas is at the absolute pressure of fifteen and twenty-five thousands (15.025) pounds per square inch and at a base temperature of sixty (60) degrees Fahrenheit, and gas volumes shall be computed into such units in the manner described below.

The orifice coefficient for each meter shall be calculated at the above base pressure and base temperature, at a flowing temperature of sixty (60) degrees Fahrenheit, and for a gas of six-hundred-thousandths (.600) specific gravity. For the purpose of measurement hereunder, the atmospheric

pressure shall be assumed to be fourteen and seven-tenths (14.7) pounds per square inch. Pressure taps for orifice meter installations shall be taken from the pipe runs two and one half (2½) internal pipe diameters upstream and eight (8) internal pipe diameters downstream from the face of the orifice plate.

The temperature of the gas delivered hereunder shall be determined by the use of recording thermometers so installed that they may properly record the temperature of the gas flowing through the meters. The average temperature recorded shall be deemed to be the gas temperature for the period under consideration and the orifice coefficient shall be corrected for each degree variation in the average temperature from sixty (60) degrees Fahrenheit.

The specific gravity of the gas shall be determined by Buyer by spot tests made with an Edwards or other standard type specific gravity balance, or by recording gravitometers so installed by Buyer that they may record the specific gravity of the gas flowing through the meters. If the spot test method is used, the specific gravity of the gas delivered hereunder shall be determined quarterly or as much oftener as Buyer may deem necessary. Each such spot test so made shall determine the specific gravity to be used in the computation of the volume of gas delivered during the succeeding billing months until the next test. The orifice coefficient shall be corrected for each one-thousandth (.001) variation in the specific gravity of the gas from six-hundred-thousandths (.600). If recording gravitometers are used, the average of the record obtained shall

be deemed to be the specific gravity of the gas for the period under consideration and the orifice coefficient shall be corrected for each one-thousandth (.001) variation in the specific gravity of the gas from six hundred-thousandths (.600).

All orifice meter computations required shall be made in accordance with formulae and tables contained in Metric Metal Works Bulletin E-2 (Revised 1931).

The volumes of gas as determined in the manner de-

scribed above shall be adjusted to give effect to the deviation of such gas from Boyle's Law, as follows:

(a) There shall be determined the average pressure (gauge) at which the gas was delivered during the period under consideration;

(b) There shall be selected from the table of multipliers attached hereto and made a part hereof, and identified as Exhibit "A", the multiplier corresponding to the average pressure as determined in (a) above and to the flowing temperature which was used for the purpose of measurement during the period under consideration;

(c) The adjusted volume of gas for the period under consideration shall be the result obtained by multiplying the volume of gas as determined in the manner above set forth by the multiplier determined in (b) above.

If the Commissioner of Conservation of the State of Louisiana should at any time disapprove the multipliers set out in said Exhibit "A" or if at any time the composition of the gas delivered to Buyer hereunder shall have materially changed so that the mutipliers set out in Exhibit "A" are no longer reasonable, either party may call for a review of such multipliers. In such event the parties shall agree upon the multipliers to be

used thereafter, and in the event of failure to agree the matter shall be submitted to arbitration in accordance with the provisions of Article XV hereof. Such new multipliers shall be subject to the approval of the Commissioner of Conservation of the State of Louisiana, if such Commissioner at that time has jurisdiction over such matters.

VIII.

The gas to be delivered hereunder shall be natural gas as produced in its natural state from the well or wells, free

of objectionable liquids and solids, except that Seller shall separate or cause to be separated any liquid hydrocarbons; provided that, by such separation, the determined heating value of the gas shall not be reduced to less than one thousand (1,000) gross British Thermal Units per cubic foot of gas. Seller may extract or cause to be extracted any natural gasoline or other liquefiable hydrocarbons such as butane, propane and ethane, and such minimum quantities of methane as is necessary in extracting the other liquefiable hydrocarbons, it being understood that methane will not be extracted as a recoverable product and that by such extraction the determined heating value of the gas shall not be reduced to less than one thousand (1,000) gross British Thermal Units per cubic foot of gas. Seller agrees that, in separating the liquid hydrocarbons or in the event Seller extracts the natural gasoline and other liquefiable hydrocarbons and ethane, it will not subject said gas, nor permit said gas to be subjected, to any treatment in such separation or extraction processes which will change the chemical composition of any of the component parts

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of said gas, permit or cause the admission of oxygen, or which will dilute said gas, or cause the gas to fail to meet any of the qualify specifications hereinafter set forth.

The gas delivered hereunder shall be merchantable gas and:

(a) Shall be dehydrated and in no event have a water content in excess of seven (7) pounds of water per million (1,000,000) cubic feet of gas measured at a pressure base of fourteen and seven-tenths (14.7) pounds per square inch and at a temperature of sixty (60) degrees Fahrenheit, as determined by a method mutually agreed upon or upon failure to agree, by dew-point apparatus approved by the U. S. Bureau of Mines.

(b) Shall not contain more than one (1) grain of hydrogen sulphide per hundred (100) cubic feet as de-

termined by quantitative test after the presence of hydrogen sulphide has been indicated by qualitative test, which shall consist of exposing a strip of white filter paper, recently moistened with a solution of one hundred (100) grains of lead acetate in one hundred (100) cubic centimeters of water, to the gas for one and one half (1½) minutes in an apparatus previously purged, through which the gas is flowing at the rate of approximately five (5) cubic feet per hour, the gas from the jet not impinging upon the test paper, and which qualitative test shall be deemed to be satisfied, if, after this exposure, the test paper is found not distinctly darker than a second paper freshly moistened with a similar solution not exposed to the gas.

(c) Shall not contain more than twenty (20) grains of total sulphur per one hundred (100) cubic feet.

(d) Shall not contain in excess of:

(i) Two per cent (2%) by volume of carbon dioxide;

(ii) One per cent (1%) by volume of oxygen;

(iii) Eleven hundred fifty (1150) gross British Thermal Units per cubic foot; or

(iv) Two-tenths (0.2) gallon per thousand (1,000) cubic feet of those certain liquefiable hydrocarbons commonly referred to as natural gasoline, as determined by the charcoal adsorption method as prescribed by the American Gas Association in its Testing Code No. 101, effective January 1, 1943.

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If all or any portion of the gas tendered by Seller for delivery hereunder fails to meet the quality specification set out in section (iv) of subparagraph (d) above and Buyer refuses to accept such gas, then Buyer shall, upon request from Seller, release from this contract that portion of the gas produced from the leaseholds covered hereby which is

unable to meet the quality specification set forth in said section (iv) of subparagraph (d) above. Nothing in this paragraph shall be construed as in anywise relieving Seller of its obligation to tender for delivery hereunder gas which meets the other quality specifications set out above.

In the event that the total heating value of the gas tendered for delivery hereunder falls below nine hundred fifty (950) British Thermal Units per cubic foot, Buyer shall have the option to refuse to accept said gas so long as said total heating value remains below nine hundred fifty (950) British Thermal Units per cubic foot. In the event, however, the total heating value of such gas falls below one thousand (1,000) British Thermal Units per cubic foot, but does not fall below nine hundred fifty (950) British Thermal Units per cubic foot, then Buyer shall not have the option to refuse to accept the gas, but must accept the same, but the price to be paid Seller by Buyer for such gas shall be adjusted so long as the heating value of the gas tendered is below one thousand (1,000) British Thermal Units but above nine hundred fifty (950) British Thermal Units, by application of the following formula:

> The heating value of the gas as determined by methods hereafter established over one thousand multiplied by the then current applicable price per one thousand (1,000) cubic feet in accordance with the price provisions of this contract.

In the event the British Thermal Unit falls below nine hundred fifty

(950) and Buyer elects to purchase such gas then the above formula shall likewise apply. The total heating value of the gas in British Thermal Units per cubic foot shall be determined by Buyer by means of some approved method of general use in the gas industry. Seller shall have the right to determine, at such time or times as it may desire, the total

heating value of the gas in British Thermal Units per cubic foot by means of some approved method of general use in the gas industry. Each party shall conduct at its own expense the test or tests made by it. Each party shall give to the other notice of the time of all tests for determining the British Thermal Unit content of the gas to be conducted by such party reasonably in advance of making the test in order that the other party may conveniently have its representative present. Should there be any material variance between tests by Buyer and Seller, a joint test will be run and will be controlling, effective from the first day of the calendar month preceding such joint test.

The British Thermal Unit content per cubic foot shall be determined for a cubic foot of gas at a temperature of sixty (60) degrees Fahrenheit when saturated with water vapor and at an absolute pressure equivalent to thirty inches (30″) of mercury at thirty-two (32) degrees Fahrenheit.

Except as otherwise specifically provided to the contrary in this Article, all measurements of gas required in this Article shall be at a temperature of sixty (60) degrees Fahrenheit and at an absolute pressure equivalent to thirty inches (30″) of mercury at thirty-two (32) degrees Fahrenheit. In addition to meeting the above specifications, the gas delivered hereunder shall be commercially free from dust, gums, gum-forming constituents, or other liquid or solid matter which might

become separated from the gas in the course of transportation through pipe lines.

IX.

The price to be paid by Buyer to Seller for each one thousand (1,000) cubic feet of gas sold to Buyer hereunder shall be as follows:

(a) Twenty-one and one half cents (21½¢) from the date deliveries of gas commence hereunder until March 1, 1963;

(b) Twenty-three and one half cents (23½¢) during the next succeeding four (4) year period after the expiration of the period set forth in (a) above;

(c) Twenty-five and one half cents (25½¢) during the next succeeding four (4) year period after the expiration of the period set forth in (b) above;

(d) Twenty-seven and one half cents (27½¢) during the next succeeding four (4) year period after the expiration of the period set forth in (c) above; and

(e) Twenty-nine and one half cents (29½¢) during the remaining period of this contract after the expiration of the period set forth in (d) above.

The prices set forth for each of the periods set forth in (b), (c), (d) and (e) are subject to redetermination in accordance with the following provisions:

Seller and Buyer shall begin the determination of a price for such period six (6) months prior to the commencement of the period for which a price determination is to be made. There shall be selected the three (3) contracts, as hereinafter described, having the highest unit prices for the purchase of gas in the following parishes in Louisiana, to-wit: Assumption, St. Mary, Terrebonne, Lafourche, and that portion of

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St. Martin situated south of Iberia, but in selecting such contracts there shall only be considered those contracts between bona fide gas pipe line companies (including Buyer) and producers. Each of the contracts considered must provide for a quantity of gas to be delivered during each year which does not exceed 125% of the total of the Annual Minimum Quantities then in effect under all of Buyer's con-

tracts for the purchase of gas in the fields covered hereby, provided, however, that no such contract shall be considered which alone or in connection with other contracts gives one purchaser an aggregate average daily quantity of gas for delivery thereunder from one field or areas adjacent thereto in excess of 125% of the daily average of the total of the Annual Minimum Quantities then in effect under all of Buyer's contracts for the purchase of gas in the fields covered hereby. First, there shall be selected for each pipe line company the one contract of such company which contains the highest unit price which will be paid by such company for gas produced and sold in the quantities hereinabove mentioned in the aforesaid parishes during the applicable period, and secondly, there shall be chosen from the contracts so selected the three (3) contracts having the highest unit prices, and the arithmetical average of the three (3) unit prices shall be obtained. In the event there will be only two (2) such pipe line companies purchasing gas in the quantities hereinabove mentioned during the applicable period, the arithmetical average shall be obtained under such two (2) contracts, being one for each pipe line company, and in the event there will be only one pipe line company purchasing gas in

the quantities hereinabove mentioned during the applicable period the highest price of such company shall be deemed to be the arithmetical average price for this determination. In the event any such contract under consideration provides for a price change during the period in question, the weighted average price for gas estimated to be purchased during such period under such contract shall be the price used in such comparisons for such contract. It is recognized that in making the selections and determinations set forth above the various contracts to be considered will probably

contain different specifications and conditions regarding the quality, pressure, delivery point and other circumstances regarding the gas to be delivered under the respective contracts. In such event appropriate adjustments in the nominal unit price set out in each of such contracts shall be made to compensate for the variation in conditions of delivery to arrive at an adjusted price which will cover delivery and receipt of gas under conditions comparable to those set out herein. Such adjusted prices shall be used, in lieu of the nominal prices set out in the respective contracts, in the selection of contracts and in the determination of the prices paid; it being the intention that all variations in contractual conditions shall be coverted by price adjustment to the same contractual conditions set out in this agreement, and that the prices used for the determinations set out herein will represent the best estimate of the average price, so adjusted, which will be paid for all gas purchased during the period in question under each contract under consideration. In the event that, in determining the average price

in accordance with the foregoing provisions of this paragraph, Seller and Buyer fail to reach an agreement as to such average price within three (3) months prior to the commencement of the period for which a price redetermination is to be made, then the matter shall be submitted to arbitration in accordance with the provisions of Article XV of this contract.

After the average price to be paid under such contracts during the applicable period has been determined in accordance with the foregoing provisions hereof, the parties agree that the price to be paid for gas delivered to Buyer hereunder during the applicable period shall be the average price determined in accordance with the foregoing pro-

visions hereof, or the price hereinabove set forth for such period, whichever is the greater.

X.

Seller agrees to pay or cause to be paid all taxes and assessments imposed on Seller with respect to the gas delivered hereunder prior to its delivery to Buyer, and Buyer agrees to pay or cause to be paid all taxes and assessments imposed upon Buyer with respect to the gas delivered hereunder after its receipt by Buyer. Neither party shall be responsible or liable for any taxes or other statutory charges levied or assessed against any of the facilities of the other party used for the purpose of carrying out the provisions of this contract.

Buyer agrees, however, to reimburse Seller for all taxes (as such term is hereinafter defined), up to but not in excess of the rate of two and three-tenths cents (2.3¢) per thousand cubic feet measured at

the basis of measurement set forth in Article VII hereof, lawfully imposed upon and paid by Seller with respect to the gas delivered hereunder or which Seller under contractual or legal obligation pays to or on behalf of the person or company on which such taxes are levied.

In the event any taxes in excess of the rate of two and three-tenths cents (2.3¢) per thousand cubic feet measured at the basis of measurement set forth in Article VII hereof are lawfully imposed upon and paid by Seller with respect to the gas delivered hereunder, Buyer agrees to reimburse Seller for three fourth (¾) of the amount of such taxes so paid by Seller or which Seller under contractual or legal obligation pays to or on behalf of the person or company on which such taxes are levied.

The term "taxes" as used herein shall mean any tax (other than ad valorem, income or excess profits tax), license, fee or charge now or hereafter levied, assessed or made by any governmental authority on the gas itself or on the act, right or privilege of production, severance, gathering, transportation, handling, sale or delivery of gas which is measured by the volume, value or sales price of the gas in question; provided, however, that the term "taxes" shall not be deemed to include any general franchise tax imposed on corporations on account of their corporate existence or on their right to do business within the state as a foreign corporation.

XI.

For the purpose of billing and accounting for the gas delivered

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hereunder the day shall begin at 7:00 A.M. and extend to 7:00 A.M. of the following day, and the month (hereinafter called "billing month") shall begin at 7:00 A.M. on the first day of the calendar month and extend to 7:00 A.M. on the first day of the following calendar month, except that the first billing month for each field covered hereby shall begin at 7:00 A.M. on the first day upon which deliveries of gas are commenced from such field and extend to 7:00 A.M. of the first day of the following calendar month. The term "contract year" for each field covered hereby shall mean a period of twelve (12) consecutive months beginning on the first day of the billing month (or any anniversary of such date) following the day upon which deliveries of gas are commenced from such field except that the first contract year shall include the first billing month.

Buyer agrees to make payment to Seller on or before the twenty-fifth (25th) day of each calendar month for all gas delivered hereunder during the preceding billing month.

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Buyer shall, within sixty (60) days after the termination of each contract year, render to Seller a statement showing the total quantity of gas received by Buyer hereunder during such contract year, and in the event that such quantity of gas so received by Buyer is less than the Annual Minimum Quantity of gas which Buyer was obligated to receive during such contract year, Buyer shall, subject to the provisions of Article II hereof, make payment with such statement for the difference between the total amount paid by Buyer for the gas received hereunder during such contract year and the amount which Buyer would have paid in the event that

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Buyer had received the Annual Minimum Quantity of gas which it was obligated to receive during such contract year.

XII.

Seller hereby warrants the title to all gas delivered hereunder, the right to sell the same, and that it is free from all liens and adverse claims, and agrees, if notified thereof by Buyer, to indemnify Buyer against all suits, actions, debts, accounts, damages, costs, losses and expenses arising from or out of any adverse legal claims of any and all persons to or against said gas. Notwithstanding the warranty herein made by Seller of its right to sell the gas delivered hereunder, but without relieving Seller of its obligations of indemnity with respect to the gas delivered and received by Buyer, Seller does not warrant the continued existence of Seller's leaseholds. Accordingly, Seller shall not be liable to Buyer in damages for breach of contract by reason of the loss of any such leasehold or underlying reservoir through failure of title or through Seller's purported failure to perform the obligations of such lease.

Seller agrees to pay or cause to be paid to the parties entitled thereto all royalties, overriding royalties, payments out of production, and other like charges on all gas delivered hereunder.

XIII.

Buyer shall, insofar as Seller is able to convey such rights, have an easement and servitude on Seller's leaseholds for installing, operating and maintaining equipment, with the right to remove the same before or within a reasonable time after the expiration of this

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contract; shall further have the right to operate, inspect and test measuring equipment; and shall, at all times, have the right to free access to any part of Seller's leaseholds for any purpose connected with any matter or thing covered by this contract.

XIV.

This contract for each field covered hereby shall continue and remain in full force and effect for a term of twenty (20) years from the date that deliveries of gas commence from such field.

XV.

Any dispute arising between Seller and Buyer in connection with the determination of Gas Reserves as provided in Article IV hereof, the deviation multipliers as provided in Article VII hereof, or in connection with the determination of the price during periods (b), (c), (d) and (e) as provided in Article IX shall be determined by a board of three arbitrators to be selected for each controversy so arising as follows: Either of the parties to such controversy may, at any time such board of arbitration is desired by it, notify the other party to such controversy in writing of the

name of an arbitrator, and such other party shall select an arbitrator and notify the party desiring arbitration of the name of such arbitrator within twenty (20) days. If such other party shall fail within twenty (20) days to name a second arbitrator, then the party who first served the notice may on reasonable notice to the other party apply to the person who is then presiding Judge of the United States Court of Appeals for the Fifth Circuit at New Orleans, Louisiana, for the

appointment of such second arbitrator for or on behalf of the other party and in such case the arbitrator appointed by the person who is such judge shall act as if named by the other party. The two arbitrators chosen as above provided for shall within twenty (20) days after the appointment of the second arbitrator choose the third arbitrator, and in the event of their failure to do so within said twenty (20) days, either of the parties hereto may in like manner, on reasonable notice to the other party, apply to the person who is such judge for the appointment of a third arbitrator and in such case the arbitrator appointed by the person who is such judge shall act as third arbitrator. The board so constituted shall fix a reasonable time and place for the hearing, at which time each of the parties hereto may submit such evidence as it may see fit. Such board shall determine the matters submitted to it pursuant to the provisions of this agreement.

The action of a majority of the members of such board shall govern and their decision in writing shall be final and binding on the parties hereto.

Each party shall pay the expense of the arbitrator selected by or for it and all other costs of the arbitration shall be equally divided between the parties hereto.

XVI.

In the event of either party being rendered unable, wholly or in part, by force majeure to carry out its obligations under this contract it is agreed that on such party giving notice and reasonably full particulars

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of such force majeure in writing or by telegraph to the other party within a reasonable time after the occurrence of the cause relied on, then the obligations of the party giving such notice, so far as they are affected by such force majeure, shall be suspended during the continuance of any inability so caused, but for no longer period, and such cause shall so far as possible be remedied with all reasonable dispatch; provided that nothing herein contained shall relieve Buyer of the obligation to pay Seller for gas actually delivered hereunder.

The term "force majeure", as employed herein, shall mean acts of God, strikes, lockouts or other industrial disturbances, acts of the public enemy, wars, blockades, insurrections, riots, epidemics, landslides, lightning, earthquakes, fires, storms, floods, high water, washouts, arrests and restraints of governments and people, civil disturbances, explosions, breakage or accident to machinery or lines of pipe, the necessity for making repairs or alterations to machinery or lines of pipe, freezing of wells or lines of pipe, partial or entire failure of natural gas wells, and any other causes, whether of the kind herein enumerated or otherwise, not reasonably within the control of the party claiming suspension; such term shall likewise include (a), in those instances where any party hereto is required to obtain servitudes, rights of way grants, permits or licenses to enable such party to fulfill its obligations hereunder, the inability of such party to acquire, or the delays on the part of such party in acquiring, at reasonable cost and after the ex-

ercise of reasonable diligence, such servitudes, rights of way grants, permits or licenses, and (b), in those instances where any party hereto is required to furnish materials and supplies for the purpose of constructing or maintaining facilities or is

required to secure permits or permissions from any governmental agency to enable such party to fulfill its obligations hereunder, the inability of such party to acquire, or the delays on the part of such party in acquiring, at reasonable cost and after the exercise of reasonable diligence, such materials and supplies, permits and permissions.

It is understood and agreed that the settlement of strikes or lockouts shall be entirely within the discretion of the party having the difficulty, and that the above requirement that any force majeure shall be remedied with all reasonable dispatch shall not require the settlement of strikes or lockouts by acceding to the demands of opposing party when such course is inadvisable in the discretion of the party having the difficulty.

XVII.

This contract is subject to all present and future valid orders, rules and regulations of any regulatory body of the Federal Government or the State in which these premises are situated, having jurisdiction.

XVIII.

As between the parties hereto, Seller shall be in control and possession of its gas deliverable hereunder and responsible for any damage or injury caused thereby until the same shall have been delivered to Buyer at the above described delivery points, after which delivery Buyer shall be in exclusive control and possession thereof and responsible for any injury or damage.

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XIX.

All the stipulations, terms and conditions of this contract shall extend to and be binding upon the respective successors and assigns of the parties hereto and shall constitute a real right and covenant running with the land. Seller hereby agrees that in the event Seller assigns or conveys all or any part of the leaseholds covered by this contract, Seller shall provide in such assignment or conveyance that such leaseholds are assigned or conveyed subject to the terms and provisions of this contract and that the party or parties to whom such assignment or conveyance is made shall be bound by the terms and provisions of this contract. It is further understood and agreed that any assignment or conveyance of any interest of Seller in accordance with the provisions of this Article shall not be binding upon Buyer until Buyer has been furnished with a certified copy of such assignment or conveyance.

IN WITNESS WHEREOF, the parties hereto have caused this agreement to be executed in duplicate originals by their respective corporate officers, thereunto duly authorized, as of the day and in the year first hereinabove written.

THE SUPERIOR OIL COMPANY,

By /s/ R. C. WARD,
Vice President,

and

/s/ MURRAY CHRISTIAN,
Assistant Secretary.

Seller.

WITNESSES:

/s/ J. C. NORMAN
/s/ D. J. MAYHALL

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UNITED GAS PIPE LINE COMPANY,

By /s/ M. V. COUSINS,
Vice President,

ATTEST:

/s/ ————————
Secretary.

Buyer.

WITNESSES:

/s/ CEOLA CURRAN
/s/ PEGGY VOELCKER

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STATE OF LOUISIANA
PARISH OF CADDO

On the 10 day of Sept., 1958, before me appeared M. V. Cousins, to me personally known, who, being by me duly sworn did say that he is Vice President of UNITED GAS PIPE LINE COMPANY, and that the seal affixed to said instrument is the corporate seal of said corporation and that said instrument was signed and sealed in behalf of said corporation by authority of its Board of Directors, and said M. V. Cousins acknowledged said instrument to be the free act and deed of said corporation.

/s/ JAMES L. ASKEW,
Notary Public in and for
Caddo Parish, Louisiana

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STATE OF TEXAS
COUNTY OF HARRIS

BEFORE ME, the undersigned authority in and for said County and State, on this day personally appeared R. C.

Ward and Murray Christian, personally known to me to be the Vice President and Assistant Secretary, respectively, of THE SUPERIOR OIL COMPANY, a corporation, and personally known to me to be the persons whose names are subscribed to the foregoing instrument, who severally, being by me duly sworn, deposed and said that they know the corporate seal of said corporation is the seal affixed to the foregoing instrument and severally acknowledged to me that as such officers, respectively, they executed and delivered said instrument as said officers, respectively, and caused the corporate seal of said corporation to be affixed thereto, pursuant to the authority given by the Board of Directors of said corporation, as their free and voluntary act and deed, and as the free and voluntary act and deed of said corporation, for the uses, purposes and consideration therein set forth, and in the capacities therein stated.

GIVEN UNDER MY HAND AND SEAL OF OFFICE, this 8th day of September, 1958.

MAE KING,
Notary Public in and for

My Commission expires
June 1, 1959.

BOYLE'S LAW DEVIATION MULTIPLIERS FOR ORIFICE METERS

Average Temperature = °F

Average Pressure Psig	40-44	45-49	50-54	55-59	60-64	65-69	70-74	75-79	80-84	85-89	90-94	95-99	100-104	105-109	110-114	115-119	120-124	1
0-49	1.004	1.004	1.004	1.003	1.003	1.003	1.003	1.003	1.003	1.003	1.003	1.003	1.002	1.002	1.002	1.002	1.002	
50-99	1.009	1.009	1.009	1.008	1.008	1.008	1.008	1.007	1.007	1.007	1.007	1.006	1.006	1.006	1.006	1.005	1.005	
100-149	1.014	1.014	1.013	1.013	1.012	1.012	1.012	1.011	1.011	1.010	1.010	1.010	1.009	1.009	1.009	1.008	1.008	
150-199	1.019	1.018	1.017	1.017	1.016	1.016	1.016	1.015	1.014	1.014	1.014	1.013	1.013	1.012	1.012	1.011	1.011	
200-249	1.024	1.023	1.022	1.022	1.021	1.020	1.020	1.019	1.018	1.018	1.017	1.017	1.016	1.015	1.015	1.014	1.014	
250-299	1.029	1.028	1.027	1.026	1.025	1.024	1.024	1.023	1.022	1.021	1.021	1.020	1.019	1.019	1.018	1.017	1.016	
300-349	1.034	1.033	1.032	1.031	1.030	1.029	1.028	1.027	1.026	1.025	1.024	1.024	1.023	1.022	1.021	1.020	1.020	
350-399	1.039	1.038	1.036	1.035	1.034	1.033	1.032	1.031	1.030	1.029	1.028	1.027	1.026	1.025	1.024	1.023	1.022	
400-449	1.044	1.043	1.041	1.040	1.039	1.038	1.036	1.035	1.034	1.033	1.032	1.031	1.030	1.029	1.028	1.027	1.026	
450-499	1.050	1.048	1.046	1.045	1.043	1.042	1.040	1.039	1.038	1.036	1.035	1.034	1.033	1.031	1.030	1.029	1.028	
500-549	1.055	1.053	1.051	1.049	1.048	1.046	1.045	1.043	1.041	1.040	1.039	1.037	1.036	1.035	1.033	1.032	1.031	
550-599	1.060	1.058	1.056	1.054	1.052	1.051	1.049	1.047	1.045	1.044	1.042	1.040	1.039	1.038	1.036	1.035	1.033	
600-649	1.066	1.064	1.062	1.059	1.057	1.055	1.053	1.052	1.049	1.048	1.046	1.044	1.042	1.041	1.039	1.038	1.036	
650-699	1.072	1.069	1.067	1.064	1.062	1.059	1.057	1.055	1.053	1.052	1.050	1.048	1.046	1.044	1.043	1.041	1.040	
700-749	1.077	1.075	1.072	1.069	1.067	1.064	1.061	1.059	1.057	1.055	1.053	1.051	1.049	1.047	1.045	1.044	1.042	
750-799	1.083	1.080	1.077	1.074	1.071	1.068	1.066	1.063	1.061	1.059	1.056	1.054	1.052	1.050	1.049	1.047	1.045	
800-849	1.089	1.085	1.082	1.079	1.076	1.072	1.070	1.067	1.064	1.062	1.060	1.058	1.056	1.054	1.052	1.050	1.048	
850-899	1.094	1.090	1.087	1.083	1.080	1.077	1.074	1.071	1.068	1.065	1.063	1.061	1.059	1.057	1.055	1.053	1.051	
900-949	1.100	1.096	1.092	1.088	1.084	1.081	1.078	1.075	1.072	1.069	1.066	1.064	1.062	1.060	1.058	1.055	1.053	
950-999	1.105	1.101	1.097	1.092	1.089	1.085	1.082	1.078	1.075	1.073	1.070	1.067	1.065	1.063	1.061	1.058	1.056	
1000-1049	1.111	1.106	1.102	1.097	1.093	1.089	1.085	1.082	1.079	1.076	1.073	1.071	1.068	1.065	1.063	1.061	1.059	
1050-1099	1.117	1.112	1.107	1.102	1.098	1.093	1.090	1.086	1.082	1.079	1.077	1.074	1.071	1.069	1.067	1.064	1.062	
1100-1149	1.122	1.117	1.111	1.106	1.102	1.097	1.093	1.089	1.086	1.083	1.080	1.077	1.074	1.072	1.069	1.067	1.064	
1150-1199	1.127	1.122	1.116	1.110	1.106	1.101	1.097	1.093	1.089	1.086	1.083	1.080	1.077	1.074	1.072	1.069	1.066	
1200-1249	1.133	1.127	1.121	1.115	1.110	1.105	1.100	1.096	1.092	1.089	1.086	1.083	1.079	1.077	1.074	1.071	1.068	
1250-1299	1.139	1.132	1.125	1.119	1.113	1.108	1.104	1.100	1.096	1.092	1.089	1.085	1.082	1.080	1.077	1.074	1.071	
1300-1349	1.144	1.136	1.129	1.123	1.117	1.112	1.107	1.103	1.099	1.095	1.092	1.089	1.085	1.082	1.079	1.076	1.073	
1350-1399	1.149	1.141	1.134	1.127	1.121	1.115	1.110	1.106	1.102	1.098	1.094	1.091	1.088	1.085	1.082	1.079	1.076	
1400-1449	1.154	1.146	1.138	1.131	1.125	1.119	1.114	1.109	1.105	1.101	1.097	1.094	1.090	1.087	1.084	1.081	1.078	
1450-1499	1.159	1.150	1.142	1.135	1.128	1.122	1.117	1.113	1.108	1.104	1.100	1.096	1.093	1.089	1.086	1.083	1.080	

9-27-48

OVERSIZE PAGE SEE NEXT FRAME
FOR REMAINDER OF PAGE

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BOYLE'S LAW DEVIATION MULTIPLIERS FOR ORIFICE METERS

Average Temperature - °F																Average Pressure Psig
0-74	75-79	80-84	85-89	90-94	95-99	100-104	105-109	110-114	115-119	120-124	125-129	130-134	135-139	140-144	145-149	
.003	1.003	1.003	1.003	1.003	1.003	1.002	1.002	1.002	1.002	1.002	1.002	1.002	1.002	1.002	1.002	0-49
.008	1.007	1.007	1.007	1.007	1.006	1.006	1.006	1.006	1.005	1.005	1.005	1.005	1.005	1.005	1.005	50-99
.012	1.011	1.011	1.010	1.010	1.010	1.009	1.009	1.009	1.008	1.008	1.008	1.008	1.007	1.007	1.007	100-149
.018	1.015	1.014	1.014	1.014	1.013	1.013	1.012	1.012	1.011	1.011	1.011	1.010	1.010	1.010	1.009	150-199
.020	1.019	1.018	1.018	1.017	1.017	1.016	1.015	1.015	1.014	1.014	1.013	1.013	1.012	1.012	1.011	200-249
.024	1.023	1.022	1.021	1.021	1.020	1.019	1.019	1.018	1.017	1.016	1.016	1.015	1.015	1.015	1.014	250-299
.028	1.027	1.026	1.025	1.024	1.024	1.023	1.022	1.021	1.020	1.020	1.019	1.018	1.017	1.017	1.016	300-349
.032	1.031	1.030	1.029	1.028	1.027	1.026	1.025	1.024	1.023	1.022	1.021	1.021	1.020	1.019	1.019	350-399
.036	1.035	1.034	1.033	1.032	1.031	1.030	1.029	1.028	1.027	1.026	1.025	1.024	1.023	1.022	1.021	400-449
.040	1.039	1.038	1.036	1.035	1.034	1.033	1.031	1.030	1.029	1.028	1.027	1.027	1.026	1.025	1.024	450-499
.045	1.043	1.041	1.040	1.039	1.037	1.036	1.035	1.033	1.032	1.031	1.030	1.029	1.028	1.027	1.026	500-549
.049	1.047	1.045	1.044	1.042	1.040	1.039	1.038	1.036	1.035	1.033	1.032	1.031	1.030	1.029	1.028	550-599
.053	1.052	1.049	1.048	1.046	1.044	1.042	1.041	1.039	1.038	1.036	1.035	1.034	1.033	1.031	1.030	600-649
.057	1.055	1.053	1.052	1.050	1.048	1.046	1.044	1.043	1.041	1.040	1.038	1.036	1.035	1.034	1.033	650-699
.061	1.059	1.057	1.055	1.053	1.051	1.049	1.047	1.045	1.044	1.042	1.041	1.039	1.038	1.036	1.035	700-749
.066	1.063	1.061	1.059	1.056	1.054	1.052	1.050	1.049	1.047	1.045	1.043	1.041	1.040	1.039	1.037	750-799
.070	1.067	1.064	1.062	1.060	1.058	1.056	1.054	1.052	1.050	1.048	1.046	1.044	1.043	1.041	1.040	800-849
.074	1.071	1.068	1.065	1.063	1.061	1.059	1.057	1.055	1.053	1.051	1.049	1.047	1.045	1.044	1.042	850-899
.078	1.075	1.072	1.069	1.066	1.064	1.062	1.060	1.058	1.055	1.053	1.051	1.049	1.047	1.046	1.044	900-949
.082	1.078	1.075	1.073	1.070	1.067	1.065	1.063	1.061	1.058	1.056	1.054	1.052	1.050	1.048	1.046	950-999
.085	1.082	1.079	1.076	1.073	1.071	1.068	1.065	1.063	1.061	1.059	1.056	1.054	1.052	1.050	1.048	1000-1049
.090	1.086	1.082	1.079	1.077	1.074	1.071	1.069	1.067	1.064	1.062	1.059	1.057	1.055	1.053	1.051	1050-1099
.093	1.089	1.086	1.083	1.080	1.077	1.074	1.072	1.069	1.067	1.064	1.062	1.059	1.057	1.055	1.053	1100-1149
.097	1.093	1.089	1.086	1.083	1.080	1.077	1.074	1.072	1.069	1.066	1.064	1.062	1.059	1.057	1.055	1150-1199
.100	1.096	1.092	1.089	1.086	1.083	1.079	1.077	1.074	1.071	1.068	1.066	1.064	1.061	1.059	1.056	1200-1249
.104	1.100	1.096	1.092	1.089	1.085	1.082	1.080	1.077	1.074	1.071	1.068	1.066	1.063	1.061	1.058	1250-1299
.107	1.103	1.099	1.095	1.092	1.089	1.085	1.082	1.079	1.076	1.073	1.071	1.068	1.065	1.062	1.060	1300-1349
.110	1.106	1.102	1.098	1.094	1.091	1.088	1.085	1.082	1.079	1.076	1.073	1.070	1.067	1.064	1.062	1350-1399
.114	1.109	1.105	1.101	1.097	1.094	1.090	1.087	1.084	1.081	1.078	1.075	1.072	1.069	1.066	1.064	1400-1449
.117	1.113	1.108	1.104	1.100	1.096	1.093	1.089	1.086	1.083	1.080	1.077	1.073	1.070	1.068	1.065	1450-1499

Exhibit "A"

Contract The Superior Oil Company and United Gas Pipe Line Company

D360

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Jerome K. Kuykendall, Chairman; Frederick Stueck, Arthur Kline and John B. Hussey.

In the Matters of

THE CALIFORNIA COMPANY
Docket No. G-16108

THE SUPERIOR OIL COMPANY
Docket No. G-16388

UNITED GAS PIPE LINE COMPANY
Docket No. G-16556

Order Issuing Certificates of Public Convenience and Necessity and Modifying and Adopting Initial Decision of the Presiding Examiner

(Issued August 10, 1959)

On April 16, 1959, the presiding examiner issued an initial decision in the above-entitled proceedings by which he would grant a certificate of public convenience and necessity under Section 7(e) of the Natural Gas Act to The California Company and The Superior Oil Company (Superior), authorizing these companies to render sales of natural gas to United Gas Pipe Line Company (United). The California Company would produce its gas from the Bayou Penchant Field, Terrebonne Parish, Louisiana. Superior would produce its gas from the Bayou Penchant, Palmetto Bayou and Four Isle Dome Fields, Terrebonne Parish, Louisiana. The initial price for these proposed sales is 21.5 cents, without tax reimbursement. The examiner would also authorize United to construct and operate facilities estimated to cost $1,120,312, to receive deliveries of the gas into its system.

(D360)

Exceptions to the examiner's decision were filed only by United Gas Improvement Company (UGI), a distributing company which sells gas in Philadelphia and vicinity, and by Superior.

This case is companion to *Matters of Sun Oil Company,* Docket Nos. G-15122, *et al.,* order issued this date. Here as there, UGI requests that final action on the applications in this case be withheld until decision is reached by the Supreme Court in *Atlantic Refining Co.* v. *Public Service Commission of the State of New York* (the *Catco* case), and by the Court of Appeals for the Third Circuit in *United Gas Improvement Co.* v. *F.P.C.*, taking the position that here as there the facts do not support the initial price proposed by the producers, and that the producer

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sales proposed herein should be treated in the same manner that the sales in the Court cases cited are permitted or required to be treated.

Decisions have now been handed down in the *Catco* case, 79 Sup. Ct. 1246, (June 22, 1959), and the *United Gas Improvement Company* case, Nos. 12797 and 12805 (CA 3, August 4, 1959), —F 2d —.

We conclude, as more fully appears below, that with certain modifications, the presiding examiner's initial decision should be adopted and UGI's exceptions thereto denied.

Our understanding of the requirements of the Supreme Court's *Catco* opinion we stated in our Opinion No. 325 and accompanying order issued August 7, 1959, in *Matters of South Georgia Natural Gas Company,* Docket Nos. G-9892, *et. al.* See also our opinions in the *Texas Gas Transmission Corporation* case, G-17335, *et. al.,* and the *Transwestern*

Pipeline Company case, G-14871, *et al.* Summarizing briefly, under the *Catco* case the producer's proposed initial price must be supported by substantial evidence establishing that the price is required by the public convenience and necessity and is in the public interest; and although the Commission should consider all the factors, price is an element of prime importance, which the Commission should scrutinize closely with a view to protecting the consumer. The Court further indicated what evidence might or should appropriately be adduced to support the proposed price, and what circumstances justified the attachment of an initial price condition. Such evidence includes evidence of whether the proposed price is "out of line"; whether it would result in triggering of general price rises or an increase in the applicant's existing rates by reason of 'favored nation' clauses or otherwise; evidence of comparisons with the existing cost of gas to the purchaser; evidence of whether the proposed producer price would lead to an increase in the rates of the purchaser; evidence of a public need for the gas; and evidence respecting the other matters discussed by the Court in its opinion.

In addition, it appears from the Court's opinion that producer certificate proceedings need not necessarily assume the character of rate proceedings under Section 4 or 5 of the Act, the Court stating at 79 Sup. Ct., p. 1255, that "Section 7 procedures in such situations [involving the attachment of price conditions] thus act to hold the line awaiting adjudication of a just and reasonable rate." Finally, it seems clear from the opinion that if a record sustaining the proposed initial price is not made, the certificate must be denied or conditioned, as the facts require, and that therefore it is the applicant which at least runs the risk of failing to substantiate the proposed price.

In applying the *Catco* opinion, the Third Circuit Court of Appeals in the United Gas Improvement Company case cited above, upheld our opinion certificating producer sales without price conditions, concluding that on the facts there before it, the Commission did not err in the balancing of the weight it accorded the various factors of public convenience and necessity.

Many of the circumstances and considerations applicable in the Sun Oil Company case, Docket Nos. G-15122, *et. al.* also apply here, and the controlling considerations need be summarized only briefly. Our conclusion is that the requirements laid down by the Supreme Court in the *Catco* opinion have been met in this case. In our view, the evidence substantially establishes that the proposed initial price for the sales of The California Company and Superior to United is in the public interest, and the proposed sales are required by the public convenience and necessity. To us, it is clear that there is no warrant or justification for the attachment of any initial price condition in this case.

Considering whether the price is out of line under *Catco,* the facts support the conclusion that Sun's price is not out of line on a comparative basis. Much south Louisiana gas is today being sold at 21.5 cents per Mcf plus tax reimbursement. Numerous other pipeline companies compete in this general area, and a number of 21.5-cent contracts have been executed. Although the price proposed by The California Company and Superior in this case involves greater tax reimbursement than some other 21.5-cent sales, in our opinion this greater tax reimbursement is justified by the factors present, including the size of these reserves, their accessibility to United's pipeline, and the need of United to offer some additional price incentive in order to secure the volumes of gas in question.

The facts disclose that there were several prospective purchasers for this gas in addition to United, and that several offers were made to both The California Company and Superior for this gas. At least one such offer was at the same price United offered, but The California Company accepted United's offer, primarily because it preferred the "take" provisions of United's contract. Superior preferred the United offer because there would be less delay in making deliveries.

As to the possibility of increased rates resulting from triggering referred to in the *Catco* case, none of United's contracts contain any 'favored nation' clauses and none of them can be triggered by the price for these sales.

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With respect to the impact on United's cost of gas, the company estimates that it will withdraw approximately 30 billion cubic feet annually from these fields, and that the combined effect of the contracted prices on United's overall cost of gas will be an average increase of two and seven-tenths mills per Mcf. Considering the benefits to United of the acquisition of these reserves, in our judgment this effect does not require denying the sale or attaching a condition.

Among those benefits is the gas supply which would be added to United's system. United estimates that it will acquire through these two contracts 636 billion cubic feet of reserves, a very substantial volume. Moreover, this gas could be added to United's system with very little line construction. Furthermore, United needs this gas to help meet the present and future demands of its customers and the markets it serves. The facts disclose that United delivers to its customers in excess of 1 trillion cubic feet of gas each year, that the demands on United's system increase each year, and that United must continue its policy of buying gas reserves in order to continue to supply the service

it has undertaken to provide. The fact cannot be avoided that the price offered must be sufficient to induce the producer to sign the contract. The facts support the conclusion that United bought this gas on the best terms possible, and that it could not have gotten these desirable reserves at any lower price.

The gas sales contracts involved in this case were consummated only after arm's-length negotiation and there is no affiliation or corporate control between Sun and United, although this fact of itself is not sufficient to sustain the proposed price.

Turning to Superior's exceptions, Superior objects to paragraph (E) of the examiner's decision which invokes various subsections of Section 157.20 of the Commission's Regulations under the Natural Gas Act as to Superior, contending that this Section applies to pipelines not producers. The examiner's decision should be modified to eliminate any requirement for compliance by Superior with subsection (c) of Section 157.20.

We conclude that the producer sales proposed herein are substantially supported by the evidence of record and should be certificated at the prices proposed, without the attachment of any price condition.

D364

The Commission further finds:

All material exceptions, arguments and objections not discussed herein have been considered but are without substantial support in the record or a reasonable basis in law and should be denied. Except to the extent granted herein, the parties' exceptions should be denied. The presiding examiner's initial decision issued herein on April 16, 1959,

should, except to the extent modified by this order, be adopted by the Commission as of the date of issuance of this order, to constitute with this order its decision in these proceedings.

The Commission orders:

(A) The initial decision of the presiding examiner issued herein on April 16, 1959, is modified as hereinabove set forth, and as so modified, is adopted by the Commission as of the date of issuance of this order, to constitute with this order its decision in these proceedings.

(B) The exceptions filed by the parties to the aforesaid initial decision are, except to the extent granted by this order, hereby denied.

By the Commission.

[SEAL]

Federal Power Commission

/s/ J. H. GUTRIDE
Joseph H. Gutride, *Secretary.*

EXCERPTS FROM TRANSCRIPT OF HEARING HELD JUNE 18 THROUGH JUNE 21, 1962

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Presiding Examiner:

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I think it would be far healthier if the parties who are taking the position that no cost evidence of the type distributed in this case should be received here would take the more strict position, if "strict" is a good word, that no type of cost evidence should be received in this type of proceeding or in a Section 7(b) abandonment proceeding because it seems to me really that the question that we have to face up to in this case today is really whether any kind of cost evidence at all should be used in this type of proceeding.

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Mr. Snodgrass: This cost evidence of individual companies, you didn't mean to exclude broad industry type cost?

Presiding Examiner: Yes, I did.

Mr. Snodgrass: We have testimony and exhibits of Dr. Foster, which have been served and—

Presiding Examiner: I apply my ruling to Dr. Foster's type of presentation.

Mr. Snodgrass: You would rule all that out too?

Presiding Examiner: The type of presentation which purports to compare costs for a period of five years or whatever it was, referred to as financial requirements with the revenues to be received from the reserves related to those discoveries.

Mr. Snodgrass: I don't believe that you got my point. I will back up and try one more time.

Dr. Foster is an economist and he has put in a great deal of testimony concerning trends of costs in this industry.

Presiding Examiner: That has been referred to in some cases as economic trend data referring to the need for deeper drilling and the like.

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Mr. Snodgrass: Yes. You are excluding that?

Presiding Examiner: Yes. My ruling does exclude that type of evidence as well.

Mr. Snodgrass: I doubt that we have any need to come back tomorrow. There is nothing left.

Mr. Bardin: Well, staff has circulated a letter indicating that we will move to strike this so-called economic trend data on additional grounds relating to the Commission's determinations in Opinion 358 and we would like to make that motion at some appropriate time.

Presiding Exaimner: I might say, gentlemen, that my general position with respect to what has sometimes been described as the economic trend data is whether you agree with me or not I require evidence of that type as being what I would characterize as fragmentary cost evidence or fragmentary cost data.

Since I have taken the broad poistion that I would not receive full cost of service evidence in this proceeding, it would not make much sense for me to expect to find some help in this proceeding by the use of fragmentary cost data.

Mr. Varner.

Mr. Varner: I think perhaps you said this, but I would like to be real clear. Am I correct in understanding that the only testimony that we can put in in this case has to do with price line and—

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Presiding Examiner: I think that would be a fair statement.

Mr. Varner: That is correct. Is that right?

Presiding Examiner: I think that would be a fair statement. There may be some other types of evidence which—

Mr. Varner: The only other type as I understand it, would be that there is something that is to be tacked to the price line by virtue of some peculair gathering or processing or central point of delivery.

Presiding Examiner: I want to leave myself a small escape hatch. If there is some other type of evidence in the material presented tomorrow morning which may not be within my broad exclusionary ruling, but which I have forgotten for the moment and which may not be properly described as in-line type evidence, I will reserve the right to consider that at that time.

Mr. Varner: This puts us in a little bit unusual position too, Mr. Examiner, in that we could hardly forsee such a ruling as this and therefore I wanted to know exactly where we stood as clearly as possible.

Presiding Examiner: All right.

Mr. Snodgrass.

Mr. Snodgrass: Your Honor's candor in this ruling is really appreciated, but I want to make certain again that I

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understand what you have told us. We are going to add up these prices, field prices, and arrive at an in-line price in some manner or other.

Presiding Examiner: Well, I don't think I should—Mr. Snodgrass, let me put it this way: I don't think I want to allow you or I don't think it is necessary for me to allow you to commit me at this preliminary stage to writing a final decision in this case and I don't think that—

Mr. Snodgrass: Your Honor has told us as far as the evidence is concerned there is no place else to go.

Presiding Examiner: Well, I think I have made my

position quite clear and I don't think you will have any difficulty.

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Dr. J. Rhoads Foster

was called as a witness, being first duly sworn, and testified as follows:

Mr. Varner: Mr. Examiner, I would like to have marked for identification a document in one binder, consisting of 28 pages, marked "Prepared Testimony of J. Rhoads Foster".

Presiding Examiner: There is identified as Exhibit X-40 the prepared testimony of the witness J. Rhoads Foster.

(Whereupon the document referred to was marked for identification as Exhibit X 40.)

Mr. Varner: I would like additionally identified as a further exhibit, in one binder, consisting of 58 pages, and marked on the frontispiece "Market Price, Cost and Related Information Bearing on the Question of Price for South Louisiana Supplies".

Presiding Examiner: There is identified as Exhibit X-41 the document described by counsel bearing the legend on the cover sheet "Witness J. Rhoads Foster, Market Price, Cost", and so forth.

(Whereupon the document referred to was marked for identification as Exhibit X-41.)

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Mr. Varner: Mr. Examiner, I move that Exhibits X-40 and X-41 be admitted into evidence in this proceeding.

Presiding Examiner: Is there any objection, Mr. Bardin?

Mr. Bardin: Yes, Your Honor. On two scores Staff

would object to certain portions of these exhibits. The first score would be your ruling of yesterday, and second would be the similarity and virtual identify of these studies with the studies that Dr. Foster presented in Exhibit No. 7 of the El Paso case which resulted in Opinion No. 358, and Exhibit No. 12 of the CATCO case, which resulted in Opinion No. 351, both of which cases the Commission declined to give any probative force whatever to such studies.

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Mr. Bardin: I will ask preliminary questions.

Dr. Foster, are you the same Dr. Foster who testified in Docket Nos. G-11024, et al., the re-opened CATCO case?

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The Witness: I did testify in the reopened CATCO case.

Mr. Bardin: Did you sponsor Exhibit No. 12 in that case?

The Witness: That is the number of the exhibit, to the best of my memory.

Mr. Bardin: Are you also the same Dr. Foster who testified in Docket Nos. CP60-72, et al., the consolidated proceeding involving El Paso Natural Gas Company, Pan American Petroleum Corporation, Humble Oil, Belco Petroleum, and Beneficial Oil?

The Witness: I did testify in the proceeding involving those companies.

Mr. Bardin: Did you sponsor Exhibit No. 7 in those proceedings?

The Witness: I don't remember the number of the exhibit but I will assume it is No. 7.

Mr. Bardin: Were the exhibits which you sponsored in the CATCO and El Paso proceedings constructed on similar principles to those involved in your Exhibit X-41 in this case?

The Witness: I think a fair answer to that question is in the affirmative. I think the basis of the principles, which are guiding, an economic analysis of price relative to supply requirements were recognized in those cases as well as in this.

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Mr. Bardin: Is there any substantial distinction between the principles underlying your studies in these proceedings and those you utilized in the El Paso and CATCO proceedings?

The Witness: There is certainly no substantial or any distinction as to principle. As to content of exhibit materials and treatment, there may be significant differences due to a different time, different area, the different factual background.

Presiding Examiner: The type of study generally is the same?

The Witness: The type of study is directed to the economic aspects of the price questions, which are generally the same.

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Presiding Examiner: Do I understand it would be correct to say that the exhibit and testimony presented by Dr. Foster in the El Paso case, which is the subject of Opinion No. 358, Exhibit 7 cited by you, and the related testimony, involved the same type of studies and the same basic methodology as Exhibits X-40 and X-41 in this proceeding, Dr. Foster? In other words, are the studies—let me put it this way: Is Dr. Foster's Exhibit 12 in the CATCO case and Exhibit 7 in the El Paso case roughly the same type of study?

The Witness: The same type of study. The basic ap-

priach, what Mr. Bardin refers to as guiding principles, were the same.

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Presiding Examiner:

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My view on the admissibility of this type of evidence as presented here by Dr. Foster, and also presented by him in the Catco case, and similarly in the El Paso case, which was the subject of Opinion 358, is that I am going to grant the motion to strike or to exclude this type of evidence for two reasons.

First is that in my view, after reading the entire discussion covering some three pages in Opinion No. 358, of this type of evidence presented by Dr. Foster in that case, and the Commission's reaction to it, and the weight to be given to it, I cannot agree that the situation is so significantly different in our instant proceeding as to warrant a different result, but I have a second reason which I have already set

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forth on the record for excluding this exhibit, and that is, and this is merely a repetition of what I stated at earlier points in this hearing: That I regard this type of evidence as what I call fragmentary cost evidence, and since I am taking the much broader position that I will not receive full and comprehensive cost presentations by the producers in this proceeding designed to show their total industrywide cost for the production of natural gas, I do not see what helpful purpose would be served and what helpful conclusions could be drawn from a consideration of

what I regard as fragmentary-type cost studies, so I am going to grant the motion to strike or exclude.

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Presiding Examiner: Back on the record.

First, before we get any further, I think it would be helpful if we had a clear statement made on the record indicating that all of Dr. Foster's presentation which has now been identified has been presented in this hearing is sponsored by a number of different producer-applicants.

Mr. Varner: Correct.

Presiding Examiner: As indicated in the transmittal letter of May 16, 1962, transmitting that information.

I will read into the record the list of the applicants who have sponsored this testimony and exhibit:

Amerada Petroleum Corporation.

Kerr-McGee—

Mr. Bardin: Pardon. The two listed companies are not a party to the proceeding.

Presiding Examiner: Pan American Petroleum Corporation, which is no longer a party. Phillips, which at the time being is still a party.

The other names, the Pure Oil Company is still a party to this proceeding. Shell Oil Company is still a party to

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this proceeding. Socony Mobil Oil Company, Inc., which is no longer a party to the proceeding. Sohio Petroleum Company, no longer a party to the proceeding. And the remaining two are still parties to the proceeding, Sun Oil Company, and the Superior Oil Company.

As I understand the positions expressed by Mr. Varner of Superior Oil Company would be adopted by the other producer applicants who sponsor Dr. Foster's evidence.

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Mr. Hillyer: Mr. Examiner, my name is H. H. Hillyer. I represent Berkshire Oil Company.

I would like to also be in the position of supporting the testimony of Dr. J. Rhoads Foster.

Presiding Examiner: All right.

Mr. Atwell: I understand, Mr. Examiner, do I not, this is a consolidated record, and the evidence will be of record for all of us for all purposes?

Presiding Examiner: Oh, yes. In other words, any of the parties regardless of whether they state on the record they sponsor Dr. Foster's presentation, or not, any of the parties will certainly be at liberty to properly comment and rely upon any of the evidence which is made a part of the record in this proceeding.

Mr. Hillyer: Mr. Examiner, the reason for my statement was I have an unacted upon motion for severance, which perhaps may be granted at some time.

Presiding Examiner: All right.

Now, with respect to the mechanical problem of handling the portions of the exhibit—two exhibits which are not to be excluded. In view of the fact I am excluding the major portion of the prepared testimony which has been identified as Exhibit X-40, but I am not excluding the minor portions of that testimony which have now been cited for the record, for the purpose of convenience I am going to request the reporter to copy into the transcript at this point as though read those portions of Exhibit X-40 which I have cited as not excluded by my ruling.

I think there should be no difficulty in identifying those portions in view of the detailed citation given by Staff Counsel, and then again by the Presiding Examiner.

(The prepared testimony of J. Rhoads Foster is as follows:)

Q. Will you give the reporter your name and address? A. J. Rhoads Foster. My business address is 1523 L Street, Northwest, Washington, D. C.

Q. What is your profession? A. I am an economist and am with Foster Associates, Inc., a consulting firm.

Q. What, briefly, has been your formal education? A. I studied at the University of Missouri, Columbia University, and New York University. In 1933 I received from the University of Missouri the degree of Doctor of Philosophy

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in political economy with specialization in the relation of government to business.

Q. What has been your employment other than in a consulting capacity? A. My first employment was in 1933 by Consolidated Edison Company, then New York Edison Company. In that employment I was special assistant and assistant to the rate engineer. My work had to do with the design of rate schedules and studies of markets for electric and for gas services.

From 1937 to 1942 I was economist to the Board of Public Utility Commissioners of the State of New Jersey. I was also director of special investigations for that commission, in charge of rate, financial, and accounting proceedings. I prepared studies of reasonableness of earnings and of rate levels for electric, gas, telephone, water, and other utilities in New Jersey and advised the Commission with respect to matters of legislation, regulatory policies and practices, and personnel standards and practices. I have been an independent consultant since 1942.

Q. In general, what has been your experience as an independent consultant? A. I have been employed by various private enterprises and public agencies as an independent consultant to make studies and prepare reports with respect to a wide variety

of subjects, including principles and methods of regulation, proposed legislation, cost of capital and fair rate of return, and problems of finance, taxation, pricing, and marketing.

I have given evidence on one or more occasions before the Federal Power Commission, the Securities and Exchange Commission, the Civil Aeronautics Bo[illegible] the Excess Profits Tax Council, the regulatory commissions of the States of Arkansas, Georgia, Illinois, Indiana, Kentucky, Maine, Massachusetts, Michigan, New Jersey, New York, North Carolina, Ohio, Oregon, Pennsylvania, Tennessee, Washington, and Wisconsin, the regulatory commissions of the Dominion of Canada and the Province of Alberta, and the Committee on Ways and Means of the U. S. House of Representatives.

Q. By what types of private enterprises have you been employed in a consulting capacity? A. Gas companies, including producers, transporters, distributors and integrated companies, combination electric and gas companies, electric companies, telephone companies, airline comp[illegible]ies, and local transportation companies.

Q. Briefly, what has been your employment by independent gas producers? A. The assignments by independent gas producers have been with respect to both regulatory and legislative problems. I have presented evidence before the Federal Power

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Commission on behalf of Amerada Petroleum Corporation, Champlin Oil & Refining Company, Cities Service Production Company, Columbian Fuel Corporation, Continental Oil Company, Gulf Oil Corporation, Forest Oil Corporation, Alfred C. Glassell, J[illegible]., Ohio Oil Company, Shell Oil Company, Sohio Petroleum Company, Tidewater Oil Company and Western Natural Gas Company; and on behalf of

a considerable number of producers in the "Omnibus" and the Permian Basin area proceedings. Also, I presented evidence before the Federal Power Commission on behalf of a number of producers who are parties to the Transwestern Pipeline Company, CATC, Bastian Bay, and Green River Bend certificate proceedings.

Q. I will inquire as to the identify of some of the other private enterprises for which you have presented evidence before regulatory commissions with respect to matters of price regulation. What gas pipeline companies are included? A. Panhandle Eastern Pipe Line Company, Texas Eastern Transmission Corporation, and Transcontinental Gas Pipe Line Corporation.

Q. For what gas distributing companies have you presented evidence before regulatory bodies? (end page 2) A. The Peoples Gas Light and Coke Company of Chicago, Canadian Western Natural Gas Company, Ltd., Northwestern Utilities, Ltd., and other gas distributing utilities.

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Q. Will you identify some of the electric utilities for which you have presented evidence on matters of price or rate regulation? A. Columbus and Southern Ohio Electric Company, Consolidated Edison Company of New York, Central Maine Power Company, Illinois Power Company, Pacific Power & Light Company, Pennsylvania Water & Power Company, and others.

Q. Telephone companies? A. British Columbia Telephone Company, Northern Ohio Telephone Company, Lorain Telephone Company, and many other independent telephone companies.

Q. What are the airline carriers for which you have made such appearances? A. Braniff Airways, Inc., Capital Airlines, Inc., Continental Air Lines, Inc., Delta Air Lines, Inc., and Western Air Lines, Inc. The most recent ap-

pearance was in the general investigation of airline passenger fares by the Civil Aeronautics Board.

Q. Have you been employed by trade assoications to make studies or to present evidence with respect to matters of industry-wide interest? A. Yes.

Q. Will you identify these assoications? A. Independent Natural Gas Assoication of America, Mid-Continent Oil & Gas Assoication, Edison Electric Institute,

and National Assoication of Electric Companies.

Q. What has been your employment in a consulting capacity by government agencies? A. I was employed by the Federal Communications Commission to assist in the preparation of a report on the principles and methods of fair return determination for public utilities. I was employed from time to time by the State of New Jersey and by the Board of Public Utility Commissioners of New Jersey in proceedings to advise, prepare reports, and give evidence with respect to methods of regulation, public utility finance, cost of capital or fair rate of return, and (end of page 3) reasonableness of earnings of electric, gas, and telephone utilities under the jurisdiction of that Commission.

Q. I will now inquire somewhat more specifically concerning the professional areas and types of regulatory problems with which you have acquired experience and conversancy. Were you employed as a consulting economist in connection with proposed legislation with respect to natural gas and other energy resources? A. Yes. I was employed during 1955-1957 by several independent producers in the United States to make studies of the gas producing industry, supply and demand, price structure, etc., in connection with proposed amendments of the Natural Gas Act. Also, I was employed by the Independent

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Natural Gas Assoication to make a study and report on proposals of the coal industry for administrative action and legislation with respect to natural gas and coal.

Q. What other professional experience have you had with respect to problems of pricing and marketing natural gas? A. I have prepared reports and given evidence with respect to characteristics of markets served, prospective costs to serve, and the principles and practices of cost allocation in relation to the pricing of gas service. These studies were with reference to gas distributors and markets in New England, Western Canada, and Southwestern United States. As economist to the New Jersey Commission I was responsible for design of rate schedules, classifications of service, and the adjustment of pricing schedules to characteristics of the markets served by companies under the Board's jurisdiction. I did similar work as Assistant to the Rate Engineer, Consolidated Edison Company.

Q. What has been your experience with accountancy and taxation? A. I am co-author of Foster and Rodey, "Public Utility Accounting, published by Prentice-Hall in 1951. I believe this to be the only textbood on the subject. It is used in courses in universities and in staff training programs of public utilities and accounting firms. For a period of two years,

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in addition to my duties as economist, I supervised the Accounting Department of the Public Utilities Commission of New Jersey. I am author of numerous reports and articles on accountancy, taxation, and related subjects. (end page 4)

I was employed by the Edison Electric Institute and the National Association of Electric Companies to make

studies of the character and effects of federal taxation of electric utilities. I presented evidence with respect to the economics of taxation before the Ways and Means Committee of the U.S. House of Representatives on two occasions, in 1947 and 1950.

Q. What has been your experience with corporate finance? A. I have prepared reports and given evidence with respect to cost of capital, capital structures, and financing standards on behalf of public utilities and public agencies in numerous proceedings before regulatory commissions. This includes reports to management and the giving of evidence before the Securities and Exchange Commission with respect to plans of reorganization and standards of fairness under Section 11 of the Public Utility Holding Company Act.

I am a member of the New York Society of Security Analysts and of other professional societies, and past chairman of the Committee of Corporate Finance, National Association of Railroad and Utilities Commissioners.

I have written articles on financial problems, particular-

ly in relation to regulatory policies and practices. The reports of the Committee on Corporate Finance, written during my tenure as chairman, are published in the NARUC Proceedings.

Q. Although I understand you are not a lawyer, have you had experience in the field of public utility law? A. While at New York University I taught the graduate course in public utility law in the School of Law and in the Graduate School of Business Administration of that University. Also, for some years I wrote the chapter on Public Utilities in the "Annual Survey of American Law", published by the New York University School of Law.

Q. More generally, what has been your teaching experience? A. I have taught in several schools, including New

York University from 1935 to 1952. At New York University I taught in the Department of Public Utilities and the Department of Real Estate of the School of Commerce, Accounts, and Finance, in the Graduate School of Business (end page 5) Administration, and in the Graduate Division of the School of Law. I taught courses dealing with public utility economics, regulatory policies and practices, principles of valuation, pricing and selling utility services, administrative procedure, and public utility law, and the graduate semina- n public

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utilities.

Q. What is the purpose of your testimony in this proceeding? A. The purpose is to present evidence bearing on the question of whether or not the initial contract prices for the 71 South Louisiana sales involved in this consolidated proceeding are "in line" and also on the question of whether such sales at the contract prices are required by the present or future public convenience and necessity.

Q. Are the results of your studies set forth in Exhibit No. 41, which has the title "Market Price, Cost and Related Inforamtion Bearing on the Question of Price for South Louisiana Supplies"? A. Yes.

Q. Was the exhibit prepared by you or under your direction? A. It was.

Q. Will you describe this exhibit briefly? A. It consists of 58 pages, including 17 charts and 29 schedules. The immediate source of the information shown graphically by each of the charts is a schedule identified at the bottom of the chart. I have moved a considerable number of pages in the main part of the exhibit. Additionally, the appendix includes "Technical Notes" written to provide a description of sources of information and procedures used in

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making the studies, so that the testimony may be less extensive and burdened by detail than would otherwise be necessary.

Q. Will you state, as concisely as may be possible, the kind of evidence you have brought together for the purposes of this proceeding? A. I have compiled information on the trend and pattern of market prices in South Louisiana and on the cost, supply-demand and related trends which are significant for the purpose of determining the "in line" price and also the price required by the public convenience and necessity. (end page 6)

Q. Referring now to the exhibit, will you describe Chart 1, together with the related Schedule 1 and state the purposes of this information? A. The information has two purposes. The first is to show, by years, the number of long-term gas sales contracts filed with the Commission and the related volumes supplied to pipeline companies in South Louisiana and in the Southwest. The second is to indicate the importance of the South Louisiana supply relative to the total supply brought to the interstate market from the Southwest producing area.

The information on number of contracts and sales volumes is preliminary to examination of trend and pattern of market prices in South Louisiana. Schedule 1 shows that the annual number of long-term sales to pipelines under contracts filed

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with the Federal Power Commission, including contracts filed in certificate proceedings, increased from 15 in 1954 and 24 in 1955 to 139 in 1958, and thereafter declined. The indicated annual delivery volumes under new contracts also increased substantially to 1958 and thereafter declined. The largest annual volume, 261 billion cubic feet, was represented by the 1958 contracts.

Chart 1 is directed to the importance of South Louisiana gas relative to total Southwest supplies. It shows both number of contracts and annual delivery volumes expressed as a per cent of the totals for the Southwest producing area. The volumes delivered under contracts dated during 1953-1955 amounted to 22 per cent of total Southwest supplies. That ratio increased to 42 per cent in 1957, 41 per cent in 1958 and 45 per cent in 1959. In 1960 a smaller proportion of total new supplies came from South Louisiana.

Q. Why have you not shown data for 1961 on Chart 1 and the accompanying schedule? A. Only 64 South Louisiana sales contracts dated during 1961, represented an estimated annual delivery volume of 94.4 billion cubic feet, were filed as of the end of 1961. The indications are that the decline in number of sales and volume of new supplies from South Louisiana, which began in 1960, continued through 1961. However, the data for 1961 are not shown by the chart for the reason that a significant

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number of contracts dated during the year presumably had not been filed with the (end page 7)

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Federal Power Commission as at the end of the year. This would be true of both the South Louisiana contracts and the sales contracts in other parts of the Southwest market.

Q. Referring now to Chart 2, having the title "Trend in the General Level and pattern of Initial Base Prices in the South Louisiana Sector of the Market," what measure of gas sales prices have you used in making this study of price trend and pattern? A. I have used initial base prices in making the several studies, shown by pages 3 to 11 of the exhibit, of trend and pattern of prices in the producers' market. Initial base price, not including tax

reimbursement, is the convenient and available measure. However, I have supplemented the initial base price information by a summary of the tax reimbursement provisions of long-term gas sales contracts in the South Louisiana sector of the market.

Q. Will you now describe Chart 2 and the related schedule? A. Chart 2 shows by years from 1952 to 1961 inclusive the trend or change in central tendency of initial base prices in the market, and by years, the range of prices. The average of initial base prices is represented on the chart by the weighted average and median price for each year. The range of prices is shown by the first and ninth deciles, thus excluding the highest tenth and the lowest tenth.

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The price range is based on annual delivery volumes. Schedule 2 supplements the chart by showing for each year the lowest and highest prices an dalso the lowest and highest quartiles. Thus, in 1957 and 1958, 25 per cent of the volumes was obtained at a price of 21.5 cents or more and 25 per cent was obtained at a price of 18.5 cents or less.

Q. What have been the changes in average initial base prices over the period from 1952 to 1961? A. The weighted average price increased from 14.4 cents in 1952 and 17.1 cents in 1953 to 21.1 cents in 1961. The median price increased from 16.0 cents in 1952-1953 to 21.5 cents per Mcf in 1961. Several comemnts are needed by way of explanation of these data. The averages are composites of all long-term sales. The annual averages, particularly the weighted average of prices, are influenced by changes in the (end page 8) distributions with respect to delivery conditions and other factors, especially in the distribution of sales among pipeline company buyers. The South Louisiana sector of the market became relatively more competitive as the available volumes, number of pipeline

company buyers and number of transactions increased. The increase in highest prices being paid was less than the increase in the median or weighted average, so that the dispersion of prices, over the range of highest to

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lowest price, has been greatly reduced.

It also should be noted that a change in the average price paid, however measured, does not necessarily correspond to changes in the buying rates of pipeline companies. Thus, the sharp drop in weighted average price from 1953 to 1954 was a reflection of the fact that the pipeline companies which had been paying 20 cents per Mcf made no purchases in that year. Although only 15 contracts are dated in that year, the median price was the same as for the preceding year.

Q. Do the prices represented by the averages on Chart 2 include the prices which are at issue in this proceeding or which otherwise had been "called into question" in regulatory proceedings? A. Yes.

Q. What are your reasons for this treatment? A. The purpose of the evidence is to assist the Commission in determining what the Commission called the "public interest" price. The 71 subject contracts are included and considered because it is these prices which are to be tested against the evidence of supply-demand and cost trends. The public interest is not limited to price, as such, since the consumer interest is also in adequacy of supply.

With respect to prices which have been "called into question," a mere challenge to the reasonableness of a proposed price should not establish that the price is not

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"in line" or not required by the public convenience and necessity. All market price evidence of reasonableness would cease to be available or useful for regulatory pur-

poses if those who question the prices could thereby determine or limit what may be proved to be the public interest. (end page 9)

On the other hand, it is correct that the prices established by these contracts are not, standing alone and *as such*, valid and useful evidence that the given prices are "in line" or required by the public convenience and necessity. The prices fixed by the 71 contracts which are the subject of review in this proceeding represent a third of total South Louisiana sales in 1957-1958.

However, to exclude from consideration the prices which have been "called into question" in regulatory proceedings would not solve the problem of determining the "in line" price or the price required by the public convenience and necessity. There are two compelling reasons for this conclusion. If the only acceptable evidence were prices not called into question, any intervenor could control the allowable price by challenging all prices not regarded by it with approval, for whatever reason, or by alleging that all prices are "suspect" which are equal to or higher than the prices thus questioned in regulatory proceedings.

The second reason for considering all prices which are

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established by transaction in the market is that information on and understanding of market price trend and behavior is otherwise precluded. Consideration of the trend and behavior of market prices, including the subject prices, in relation to changes in drilling costs, exploratory activity, supply requirements and other factors, is the essential basis for determining whether or not proposed prices are consistent with the public interest. The prices established by the 71 contracts are valid evidence when viewed as part of the whole pattern of prices in the competitive market. No part of the market price evidence stands alone. It is subject to being explained by consideration of the under-

lying economic forces, including the trends in supply relative to demand and drilling costs, in order to determine whether proposed prices are reasonably required to encourage exploration for and development of gas reserves.

Q. What is it that is shown by Chart 3 and the accompanying Schedule 3? A. The chart and schedule show the change, annually from 1952 to 1960, in the annual volumes obtained by pipeline companies in South Louisiana (end page 10) at different initial base prices. The chart shows the proportion obtained at 17 cents or less, at prices in the range from 17.1 to 18.5 cents, in the range from 18.6 to 21

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cents and at prices above 21 cents. Schedule 3 shows the distribution of annual delivery volumes by price, the percentage distribution of volumes by the same price intervals and, thirdly, the accumulative percentage distribution by initial base prices. To illustrate, the volumes obtained by pipeline companies in South Louisiana at initial base prices of 18.5 cents or less amounted to about 70 per cent in 1956 but only 27 per cent in 1957 and 1958. The pipelines obtained about 76 percent of total supplies at prices to 20 cents or less in 1956 but only 40 per cent in 1957 and 31 per cent in 1958.

Q. In its "Order Denying Rehearing and Clarifying Opinion," issued March 22, 1962 in the CATC proceeding, the Commission used a distribution of prices by number of contracts as distinguished from sales volumes to explain how it had determined the "in line" price in the CATC proceeding. Is Schedule 4 such a distribution of contracts as distinguished from sales volume? A. Yes. The initial base prices and price intervals, shown in Column (a) of Schedule 4 are the same as those used for the purpose of the distribution in Schedule 3 of annual delivery volumes. Thus, in 1956 about nine out of ten of the contracts established prices of 18.5 cents or less while in 1957 and 1958

the proportion was four out of ten. The proportion of sales at prices of 20 cents or less was 93 per cent in 1956 and about 50 per cent in 1957 and 1958. In

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other words, in 1957 and in 1958 about one-half of the contracts and 60 to 69 per cent of the volumes were at prices higher than 20 cents per Mcf. In my view an average price per Mcf based on volume is generally a more useful measure of current market price.

Q. What is the significance of Chart 4 on page 8 of the exhibit? A. In all producing areas where sellers are free to make choices among buyers, natural gas prices have moved upward in response to the growth of demand relative to available supply and the rising costs of exploration and development. However, as is evident from Chart 4, the increase (end page 11) in weighted average initial base prices during the last three or four years has been substantially less in South Louisiana than in the Texas Gulf Coast area or in the total Southwest. The upward push of South Louisiana prices began to slacken in 1957-1958, earlier than in the Southwest market generally, and as Schedule 5 shows, the weighted average of initial base prices in South Louisiana leveled off at slightly below 21 cents per Mcf. In 1959 the rise in level of new contract prices ended temporarily in the Southwest market as a whole.

Q. Will you now explain Schedule 6 of the exhibit? A. This schedule is a summary in two parts of the tax

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reimbursement provisions of long-term South Louisiana sales contracts.

The first part shows the distributions of number of contracts and of annual delivery volumes and amounts of reimbursement of the 2.3 cents per Mcf Louisiana sever-

ance tax. This information is set out separately for contracts subject to review in this consolidated proceeding, for other contracts dated in 1957 and 1958 and for contracts dated in 1960.

The other part of the schedule shows, separately for each of the three categories of contracts, the weighted average tax reimbursement together with the respective annual delivery volumes and numbers of contracts, in relation to the initial base prices. Thus, for contracts dated 1957 and 1958, other than the subject contracts, reimbursement of the 2.3 cents severance tax averages 1.7 cents per Mcf for sales at initial base prices of 18.5 cents or lower, 1.8 cents for sales at initial base prices in the range of 18.6 to 21.4 cents per Mcf and 20.0 cents for sales at initial base prices of 21.5 cents or higher.

As is stated by the footnote on Schedule 6, I have limited the analyses to the sales where the reimbursement of taxes is shown by the sample billing statements filed by the sellers. The reason for this limitation is that otherwise it would be necessary for me to interpret the contractual

provisions in order to arrive at a determination of typical tax reimbursement.

Q. Why have you not included information on tax reimbursement provided by contracts dated in 1959 and 1961? (end page 12) A. I believe the results of the analyses limited to 1957, 1958 and 1960 are reasonably representative of the tax reimbursement provided by long-term sales contracts in South Louisiana. The change in typical tax reimbursement has not been substantial and the analyses require a considerable amount of work.

Q. Will you now describe Schedule 7 and state its purpose? A. Counsel have requested that the weighted average price and range of initial base prices for contracts

dated in 1957 and 1958 be shown for the following six additional categories of long-term sales to pipeline companies under contracts filed with the Federal Power Commission:

(1) The 71 sales which are the subject of this proceeding;

(2) The 30 sales dated in 1957 and 1958 which were not permanently certificated as of March 1962;

(3) The 15 contracts dated in 1957 and 1958 which superseded earlier contracts and under which prices were suspended by the Commission;

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(4) All sales other than the 71 sales which are the subject of this proceeding;

(5) All sales other than the sales which are the subject of this proceeding or the 30 contracts dated in 1957 and 1958 and other sales not permanently certificated; and

(6) All permanently certificated sales under new contracts.

Q. What was the range of prices in 1957 and 1958 for sales which have been certificated and where the price is not subject to question in regulatory proceedings? A. The proportion obtained at 18.5 cents or less was only about 25 per cent of total new supply, and 25 per cent of the total was obtained at prices of at least 21.3 cents in 1957 and 22.0 cents in 1958.

Q. Based upon the studies you have made and the information set out by Exhibit 41 & 42, what is your conclusion regarding the price required by the public convenience and necessity for initial deliveries under the contracts which are the subject of this proceeding? A. My conclusion is that the initial base prices established by the

71 contracts, which are in the range of 21.0 to 22.0 cents per Mcf, plus the tax reimbursement provided by the contracts, should be accepted as the price required by the public convenience and necessity. (page 22)

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Q. Have gas prices in South Louisiana vaulted from one plateau to another and for this reason alone are they inconsistent with the public interest? A. Since the words used are undefined, it is best that one look to the facts.

In the first place, the choice of words appears to overstate the increase in new contract prices in South Louisiana. Looking to (end page 24) the period of seven years, 1953 to 1960, the increase in the highest prices per Mcf was 12.5 per cent and the increase in the weighted average of all prices was about 22 per cent. That increase in average prices was only one-half the increase which was experienced during the same period of seven years in the Southwest market as a whole as a result of rising costs and increasing demands relative to supplies of gas.

In the second place, higher prices are consistent with the public convenience and necessity when the price increases are no more than increases in drilling costs and are no more than required to bring forth the supplies needed to meet the requirements of the economy. During that period of seven years, when the average price of gas in South Louisiana increased by 22 per cent, drilling costs per Mcf of new supplies increased by at least 52 per cent. Other

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components of total industry cost of gas increased substantially although in relatively lesser degree. Thus, the increase in unit cost was 28 per cent for labor and 45 per cent for line pipe.

When higher costs reduce profitability of investment and

discourage investment, although demands are increasing, higher prices are consistent with the public convenience and necessity. (page 25)

Q. If the "in line" price for the purpose of certification by the Federal Power Commission was 18.5 cents in 1956 and if for the purpose of determining the allowable price for contracts dated from July 1957 to December 1958 the Commission applies a formula based upon the change from 1956 in average market price, what would be the "in line" price for the 71 contracts subject to review in this proceeding? A. It would be in the range from 20.7 to 23.1 cents per Mcf, depending upon the kind of measure of central tendency in the market which may be used for the purpose. The indicated "in line" price for the 71 contracts is 20.7 cents per Mcf on the basis of the weighted average, 21.7 cents on the basis of the median average measured by number of contracts, and 23.1 cents on the basis of the median price measured by annual delivery volumes. These calculated prices do not include

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tax reimbursement. The 20.7 cents per Mcf is shown by Chart 17 of the exhibit. (end page 27)

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Presiding Examiner: The document, itself, Exhibit X-40, will be marked "Excluded. Offer of Proof."

Mr. Varner: Your Honor, I think you understand that offer of proof is likewise made on behalf of all the companies sponsoring Dr. Foster's testimony which you named before.

Presiding Examiner: Very well.

(The document heretofore marked Exhibit No. X-40 for identification was excluded.)

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By Mr. Varner:

Q. Since preparation of this exhibit has there been a change in the sales still subject to the pr ceeding? A. Yes. I am not sure as to the precise number of severances or the precise number of proceedings still consolidated. As of last evening I was informed that of the original 71 contracts which were involved in the consolidated proceedings, only 20 are still involved.

Q. What effect, if any, will the change in the number of contracts still involved have on your testimony and

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conclusions in this respect? A. The change in the number of contracts involved would have no effect on my conclusions. It has an effect on my testimony only to the extent of the recognition of the change in number.

. . . . . .

Q. Are those remaining 20 contracts generally comparable with the 144 contracts shown on paragraph 7 of that same exhibit as to volume, quality, and delivery conditions? A. Yes. There is the general comparability with

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respect to these price determining factors which you mentioned, and others.

I might note, however, that the comparison indicates a somewhat higher price for the 20 than for the 144 reference contracts. Thus the average delivery volume is only about one-half as much for the 144 reference contracts shown in paragraph 7 as it is for the 20 subject contracts.

. . . . . .

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Q. Now, it is a fact, is it not, that prior to 1956, 20.0 cents was the highest initial base price at which jurisdictional gas was contracted for in South Louisiana?

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The Witness: Yes.

By Mr. Bardin:

Q. And it is also a fact, is it not, that the first time a higher initial base price for jurisdictional gas was contracted for in South Louisiana was the CATCO contracts with Tennessee Gas Transmission Company, is it not?

Would you like that read? A. I understand the question, but I think the answer is in the affirmative, but I am not absolutely sure of it.

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The Witness: The problem wasn't with the question, but with my memory. I think the answer is in the affirmative.

August, 1956.

By Mr. Bardin:

Q. That was the date of the contract, the CATCO contract, is it not? A. Yes, that is right.

Q. That was the first jurisdictional contract for an initial base price in excess of 20.0 cents, was it not? A. That is correct.

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Mr. Generelly: Mr. Examiner, I would offer these exhibits in evidence, with the candid observation that over the past two days, from what I have heard, I would gather

you, sir, would strike these exhibits as being within the ambit of your very broad motion. I do offer them, however, at this time.

Presiding Examiner: All right.

It is correct that I regard all of these exhibits as covered by my broad exclusionary ruling. Accordingly, I will exclude Exhibits X-62, X-63, X-64, X-65, and X-66, and the reporter will mark them "Excluded—Offer of Proof".

(Whereupon the documents heretofore identified as Exhibits X-62 thru X-66, inclusive, were excluded.)

Mr. Generelly: Mr. Examiner, I might say we do not agree

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with your ruling, and will take whatever course is open to us in that respect.

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Presiding Examiner: All right.

On Mr. Goodman's testimony, is there any portion of his testimony which is acceptable under the criteria I have laid down in the ruling earlier?

Mr. Generelly: If directed, Your Honor, to make a fair answer to that, I am afraid I must say none of it would be acceptable.

Presiding Examnier: All right. We will identify Mr. Goodman's entire prepared testimony as Exhibit X-69.

(Whereupon the document referred to was marked for identification as Exhibit X-69.)

Presiding Examiner: Exhibit X-69 is excluded, and will be marked "Excluded—Offer of Proof".

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Gaston C. Jones

was called as a witness, being first duly sworn, and testified as follows:

Direct Examination

By Mr. Generelly:

Q. Mr. Jones, I hand you a copy of Exhibit X-61 in this proceeding, calling your attention to the lefthand column, which refers to Docket No. G-17341, which involves Callery Properties' certificated sale to Hope Natural Gas Company from the West Rayne field, in Acadia Parish, Louisiana. You will note, sir, on that exhibit, that it is indicated thereon that no sale has ever been made from the West Rayne field. Is this in fact true? A. That was true as of yesterday when I checked last.

Q. What is the present status of the contract between Callery and Hope? A. The contract is in full force so far as all of its provisions are concerned, and I understand we expect to go on production within the next week.

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Cross Examination

By Mr. Bardin:

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Q. Turning to page 2 of your prepared testimony, Mr. Jones, you discuss there the process by which Callery serves as a conduit for receipt and distribution of income.

Then on page three you describe the problems incurred with regard to refund contingencies.

In that connection, would you please state what has happened to Callery's income, or Callery's revenues under its

rate Schedule No. 2 for the Little Bayou Pigeon Field since the January 10th order was issued? A. Those funds, except for a small amount applicable to property interests for which the rightful owners are not determined, those interests—the income attributable to those interests has been paid to such interests. That includes royalty and working interest.

Q. At the bottom of page three of your prepared testimony, the last sentence on that page, you describe a process by which Callery puts money into trust accounts where it collects money subject to refund.

Why didn't you utilize that procedure in the case of these monies? A. We have not been put on notice of any specific refund as we understand the order of January 10th. This order merely states that the Commission "might" suggest refunds. I might state that this order is now the subject of a case which we have pending in the Fifth Circuit Court of Appeals

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at this point on that particular issue, and there was no way for us to set up a trust of that type.

The trusts of that type have been set up I believe in each case by specific order of the Federal Power Commission. That procedure was suggested by us originally to keep away from the very situation which we are faced with today.

Q. Mr. Jones, did Callery receive a copy of the motion filed by the Public Service Commission of New York on June 22, 1961, which motion requested as one alternative that Callery and producers similarly situated be required to post bond for the refunding of monies involved in this proceedings? A. Yes, we did.

Q. As a result of your consideration of that motion, did Callery make any plans or any changes in its plans for dealing with its revenues? A. I might say that that is a

legal matter, and I am not a lawyer, and that gets into a great deal of technicality, but it was discussed at great length, yes.

Q. If Callery were ordered to make refunds, and upon court review that order turned out to be lawful, would Callery have the money or the borrowing power with which to do it? A. Callery does not have the money from these proceeds to make the refund, because Callery's refunds—Callery

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is required by its nominee agreements to pay out money as received to the particular co-owners, and we have been advised by our Louisiana counsel, even after the January 10th order, that with no floor, no definite refund provision in the order, that it would be very dangerous from the standpoint of losing our leases to withhold any funds from payment to royalty owners, and they stated, among other things, that there would be no basis for devising a formula for withholding such funds.

We therefore have continued to pay out on legal advice.

Q. Mr. Jones, please bear with me on a hypothetical question.

Let's assume that the end result of this proceeding, that the Commission issued an order reducing your initial price to 20.0 cents per Mcf. They fixed a price certain and ordered refunds based upon that price at the date of initial delivery.

Let's assume further that Callery feels that order is unlawful and goes to court to litigate the question, and that at least as to the refund portion of the order the Commission stays, either the Commission or the court, stays the effectiveness of that order so that the injunction is not immediate.

Would Callery be able, during the pendency of the court proceeding, to set aside revenues from this sale until a

fund had been built up equal to the refund obligations? A. I could not answer that with certainty. Again we would have to rely on legal advice, but I would say that if a

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reasonable floor were put on such refund, that from our discussions with our attorneys, that from that point on they would give us permission to withhold the portion between such floor and the total being collected.

Q. I am afraid I haven't made myself clear.

I am asking you to assume, not an order which establishes a refund liability and a floor, but an order which establishes what the price is to be and orders you in effect to refund so many thousands of dollars.

Presiding Examiner: Wouldn't that be a floor, as you understand it, Mr. Jones? Is that what you mean by a floor?

The Witness: I was speaking of a floor in cents per Mcf. We would have to have something to measure that by. Follow through on your question.

By Mr. Bardin:

Q. Let's assume the order says the price should be 20.0 cents from initial delivery. A. Yes.

Q. For the future that is what you are to collect. Don't worry about the future part because that is not my concern at the moment.

But you would be able to calculate, would you not, the difference between what you have collected and 20 cents for each Mcf sold? As a result you would know that if Callery had to comply with that order, it would have to refund a sum

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certain, so many thousands of dollars? A. From gas previously produced and paid for, right. Is this your question?

Q. The basis of calculation of the refund obligation would be production previously paid for. A. Right.

Q. But where the money came from would not be specified? A. I might say that would raise many problems.

We would, of course, attempt to comply to our ability, but in this property a total of 37.88958 per cent of this property interest has changed hands since the date of initial deliveries.

Now, this is working interest percentage. I do not have the royalty owner percentage. That would be very difficult. It could be possibly computed.

But some of these, for example, sales of property interests from one person to another account for approximately 31.7 per cent of this change.

Estates account for another 6.2 per cent.

For example, I recall one estate where the owner had died after the commencement of deliveries of gas production. The property then, by will, went over to his estate.

The estate has now been settled, and the administrator has been released.

I frankly don't know where we could go to get that money

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back. I don't know who we would look to.

This is one of the many problems faced—a retroactive refund.

Q. You face similar problems, do you not, under Section 4 of the Act? Do you have any Section 4 filings, which have been suspended, and under which you are collecting money subject to refund? A. That all goes into these trust funds.

Q. The total revenue? A. No. Everything—Section 4, that is correct—the suspension part, the increase goes into trust, and that is the part, all of which goes into trust.

Q. Only the increase? A. The increase, right.

Presiding Examiner: Would it be correct to say that under the Section 4 suspension situation, you know there, or you believe you feel confident that the maximum which would be refundable in any event would be the difference between the proposed increased rate and the rate as it was prior to the rate increase filings?

The Witness: That is correct.

Presiding Examiner: That by contrast in the situation involved in the instant dockets, are you saying that your position was that until such time as the Commission should issue a decision in which it might impose a rate condition at

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a certain prive level below your contract price, you have no way of knowing how far down the approved initial price under such circumstances might go?

The Witness: I believe that is correct.

In other words, we have tried to protect these refunds where it has been humanly possible in our estimation to protect them.

By Mr. Bardin:

Q. You are not a lawyer, are you? A. No, sir.

Q. In your last two answers to the—the answers to the Examiner's questions, you were just expressing your own personal opinion? A. That is correct.

Q. As a businessman? A. I think it is correct from that standpoint; of course we have consulted with attorneys on this from time to time.

Presiding Examiner: Mr. Bardin, I am just wondering whether there is any purpose to be served by further interrogation of this witness along these lines.

This same problem, of course, may arise in connection with some of the other dockets. In other words, you could say, and I don't think it needs a lawyer to make this kind of an analysis—you could say that one way this particular producer could have handled the situation would have been to

put in a trust fund every cent collected under these contracts and to keep it there for whatever period of years might ensue until the Commission finally decided the rate question. That represents the worst possible situation as far as the producers are concerned.

You might want to suggest that another alternative might have been that the producer could have said to itself, that it doesn't have any way of knowing whether the Commission ultimately will impose a rate condition, or if it does decide to impose a rate condition, it has no way of knowing at what price the Commission would rate condition the contract price-down. But the producer might conceivably had said to itself, "Well, perhaps, it might do it on the basis of some in-line price level, and we don't know what that will be, but we will take a guess it might be X cents, and we will deposit in a trust fund the difference between X cents and the contract price."

Well, this kind of speculation, it seems to me, there is no point to get the witness to indulge in that now.

If the Commission ultimately imposes retroactive refunds in these cases, there may be some very interesting problems along these lines, but I don't think it would be helped by interrogating this witness further.

Mr. Bardin: Perhaps, not, Your Honor, but this is a very serious situation. The Commission has denied a motion to impose bond in this case. I would suppose a strong conviction

that bond is not necessary.

Mr. Jones' testimony suggests the possibility the consumer can be protected, and the law obeyed only if the bond is imposed.

Presiding Examiner: I wasn't in this case at the time when the motion was made by the New York Public Service

Commission, and perhaps other intervenors, that bond should be required. I would be curious what is the size of the bond proposed. Was it a bond sufficient to cover the entire difference between zero and the contract price?

Mr. May: My recollection is the Commission denied that motion.

Presiding Examiner: I know they denied it. What kind of bond would have been helpful?

Mr. Bardin: I don't recall what the request was at this time, but it seems to me the record should be very clear when it goes up to the Commission as to what Callery's situation is, specifically the record should be clear on the possibility that the Commission does reduce the initial price, does order refund, and then does entertain or have submitted to it a motion for a stay filed by Callery of the effectiveness of the Commission's order.

Your Honor's attention is directed to the fact that in both the CATCO case and the Socony case the Commission stayed the effectiveness of its final order which had similar effects

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as to the refunding of previous collections, denied stays as to the prospective effect of the price.

Now, whether such treatment would be appropriate in the case of Callery is a serious question. The staff, of course, is contending that there should be reductions in initial price and should be refunds, and we would like to have the record complete on this score.

I have only one more question along this line.

Presiding Examiner: All right. I think all you are indicating is that there are some very knotty problems here, but I don't think you can solve them by interrogating this witness.

Mr. Bardin: His testimony thus far has helped bring into the open some of the magnitude of this problem.

Presiding Examiner: All right. Do you have another question?

Mr. Bardin: Yes.

By Mr. Bardin:

Q. Mr. Jones, if the Commission were now to order you to post a bond, or for Callery to post a bond, for the difference between 20 cents and the contract price on all gas sold by Callery to Hope, who would pay for that bond? A. I think we would; in lieu of that I think we would request that the Commission allow us to do the same things we have requested in other cases; that is, put this money in

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trust because with the number of people involved a bond is virtually impossible. You have to go get the endorsements of every owner and bonding procedure is too expensive, and it is not workable.

Also, a bonding procedure, you are always vulnerable, the producer is, in connection with his royalty owners.

Q. What is the bonding requirement, or the possible bonding requirement, applied to past collections of money? Would your answer be the same if you tried to set up a larger trust fund? A. Well, I don't think a bond would be feasible for us. I would rather set up, if we had to do one or the other, I would rather it be a trust fund.

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Mr Hillyer: Mr. Examiner, my name is H. H. Hillyer, Jr. I represent Berkshire Oil Company and also, if they are still parties to this proceeding, R. R. Frankel and J. R. Frankel.

In the prepared testimony of M. Paul LeBlanc, Jr., which has been previously served upon all parties, I find a clerical error on page 3 which I have taken the liberty of correcting on the original which will be offered for identification, and I ask the parties make that correction. It

is on the third line from the bottom, page 3, the date of July 18, 1958 should be August 12, 1957.

That is in line with the Staff's schedule which has been previously distributed.

Presiding Examiner: Off the record.

(Discussion off the record)

Presiding Examiner: Back on the record.

Mr. Hillyer: Mr. Examiner, I ask that there be identified as an exhibit the prepared testimony of M. Paul LeBlanc, Jr., consisting of nine pages of prepared testimony, with a verification attached, and an introduction to exhibits, and three exhibits, denominated Exhibts I, II and III.

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Exhibit I consists of 13 schedules, with an introduction.

Exhibits I and III each consist of 12 schedules, with an introduction.

We ask that this exhibit be identified, if the Examiner please.

Presiding Examiner: There is identified as Exhibit X-70 the document described by counsel which includes in one bound volume the prepared written testimony of the witness M. Paul LeBlanc, Jr., together with the attached exhibits just described by counsel.

(Whereupon the document referred to was marked for identification as Exhibit X-70.)

Mr. Hillyer: Mr. Examiner, I shall offer in evidence, on behalf of my clients, Exhibit X-70, subject to certain reservations and for certain stated purposes.

The reservations are: that by participating in this hearing and submitting evidence, my clients do not engage to accept any certificate of public convenience and necessity containing any condition that is repugnant to them.

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Secondly, they do not concede the power of the Federal Power Commission to order reparations, no matter what guise the reparations take.

The purpose of the offer is, first, to show that the filed rates are just and reasonable. Second, to show that any reduction in the filed rates would result in a confiscation,

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and therefore that any condition leading to such effect would be arbitrary, capricious and inequitable. And thirdly, to show that the imposition of a retroactive rate condtions would involve serious inequities and hardships to my clients.

Now subject to those reservations, and for those stated purposes, we offer in evidence Exhibit X-70, previously identified.

Presiding Examiner: Let me ask this, Mr. Hillyer, along the lines of a similar inquiry which I put to counsel for certain other producer applicants. Is there any portion of the prepared testimony of witness M. Paul LeBlanc, which consists of some nine pages, which bears in any significant way upon the question as to the impact upon the producer of any possible retroactive refund order which might be imposed by the Commission?

Mr. Hillyer: To a certain extent, Your Honor. I doubt that it can be successfully extricated from the rest of the testimony without the use of the exhibits, and the exhibits clearly are cost evidence.

Presiding Examiner: All right.

Mr. Hillyer: The particular matter to which I referred is Question No. 7 and Answer No. 7, on pages 3 and 4 of the prepared testimony. That question alone could perhaps—and the answer also—could perhaps be taken out of the testimony, but I doubt that it would have too much meaning

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without reference to the exhibits.

Presiding Examiner: All right.

Mr. Bardin.

Mr. Bardin: May I address two questions to Mr. Hillyer?

Regarding your statement, sir, that the offer of proof is designed to show that the rate is just and reasonable, I note that in the introduction to the exhibit portion of Mr. LeBlanc's work, page 2, there is a statement made, "M. Frankel and Sons does not believe that the traditional utility-type cost of service rate regulation is appropriate in the regulation of independent producers." Is it the intention of your statement to alter that as the position of the applicant in this case?

Mr. Hillyer: No, indeed. However, the Federal Power Commission has not always agreed with me.

Mr. Bardin: It has not always agreed with me, either.

My second question goes to the statement that Berkshire, or Frankel, might wish to reject a certificate conditioned as to price.

Mr. Hillyer: Mr. Bardin, my statement, I believe, was fairly closely phrased. All that I said was that we did not engage to accept a certificate which contained a repugnant condition.

Mr. Bardin: Should the Commission draw the inference from that statement that it is your clients' position, if the

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Commission determined that the initial price should be something less than the contract price, then your client would prefer to see the Commissions vacate its certificate, rather than reissue a conditional certificate?

Mr. Hillyer: I am not prepared to give you a direct answer to that question, but I call to your attention that these properties were sold by my client some time ago, and that the responsibility for any subsequent refund or repara-

tion will not rest ultimately with my client, but with Continental Oil Company, the purchaser.

Mr. Bardin: Thank you, sir.

Presiding Examiner: All right.

Since this evidentiary material was clearly covered by my broad exclusionary ruling on June 18, I will exclude Exhibit X-70. I will direct the reporter to mark it "Excluded—Offer of Proof".

(Whereupon the document heretofore identified Exhibit No. X-70 was excluded)

Mr. Hillyer: Mr. Examiner, in view of your ruling, to which we respectfully take exception, I wish to make a motion, and before making the motion, to explain it so it will be understandable.

With the material filed by us at the direction of the Commission's order of March 10, I think it was—

Presiding Examiner: March 7.

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Mr. Hillyer: March 7—we included a statement of position. Paragraph 3 of that statement of position reads as follows: "Finally, Berkshire shows that the Commission's order of March 7, 1962 requires petitioner to determine at its peril the type of evidence which the Commission may hereafter 'deem material to determination of the public interest initial price or prices'. Although it is now almost eight years since the decision of the Supreme Court of the United States in Phillips, the Commission has not yet laid down appropriate guides as to what evidence will be deemed material to the public interest, initial price or prices. Under such circumstances, to require a litigant to select in advance of hearing the evidence to be submitted at the hearing, to be restricted to the previously-filed evidence in its presentation, and thereafter to determine, upon rules thereafter to be announced, the materiality of such evidence, violates the fundamental principles of fair play, as well as procedural due process."

Now, Mr. Examiner, you have stricken our entire case in this proceeding. Perhaps I should have been able to foresee that eventuality, but I did not.

Under such circumstances, in order to protect my clients, it becomes necessary for me to request the Examiner for a continuance for the purpose of preparing such evidence as I may be able to prepare and present, first, directed toward the

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question of the in-line price, which Your Honor has indicated will be the controlling consideration here; and second, toward the question of equities involved in the impact upon my clients of any reparations order.

I therefore respectfully move that this matter be continued for a time sufficient to permit me to present such evidence, and I suggest a period of 30 days.

Presiding Examiner: It won't be necessary to have a discussion. I want to point out that the March 7 order issued by the Commission in this proceeding explicitely referred to the fact that in its CATCO decision, Opinion No. 351, which was issued in January of this year, the Commission had established what it regarded as the interest of in-line price for the South Louisiana Area.

The Commission then went on to state that that in-line price had been based upon its determination as to prices for the year 1956 involved in the contracts which were the subject of that particular CATCO case.

The Commission therefore suggested that some of the producer applicants in this case might wish to make a showing to indicate some other in-line price for the years involved in their particular contracts in the instant proceeding, so that the producer applicants in this case were all very clearly on notice under the March 7 order that they would have an opportunity to present evidence with respect to in-line prices

if they so desired.

Furthermore, the CATCO opinion itself, Opinion 351, I am sure there could not be any producer or any producer counsel who read the Commission's CATCO decision, Opinion No. 351, which would not realize very clearly that the Commission regarded evidence of in-line prices as a very significant basis, or part of the basis, for determining the initial rate issue in producer certificate cases.

With respect to the question of the impact of any refund order, both the Commission's January—well, I will put it this way—the Commission's January 10, 1962 order, in the instant proceeding, spelled out expressly that the Commission expected, to the extent the law permitted, to impose refund obligations upon the producers in these dockets if it imposed a rate condition in its ultimate decision in these cases; and in fact, in its March 7 order in this proceeding, the Commission stated that its final position with respect to refund obligations would depend to some extent upon the equities.

So I feel there is no doubt the parties have all been on notice of these matters for some months now, so I will deny the request for a continuance.

Mr. Ward: Your Honor, I don't want to burden the record, but I just want the record to show we sincerely disagree with your Honor. The Commission did not make it so crystal-clear

in its CATCO decision, the type evidence it was to rely upon, nor some of the other matters you just referred to in your ruling. We respectfully dissent from that view.

Mr. Hillyer: If Your Honor please, I am not going to argue the point with you, but I wish it to be clearly understood it is my position that it it is not only not so clear as

to what evidence would be accepted, but that I did not understand at the time I prepared the evidence that any evidence in addition to the cost of service evidence which was presented would be necessary.

Presiding Examiner: I understand.

We will now proceed to the next producer—

Mr. Bardin: Before Your Honor proceeds, I would like to make a statement on the record, in view of the possibility of court review.

If Hillyer's client wishes to raise this question with the Commission, it is Staff's position that any motion for leave to introduce additional evidence, any statement made in exception to the Examiner's decision, or any application for further hearing, must be accompanied either by a copy of the evidence which you would offer to prove as a result of any such continuance, or an extremely detailed and specific description of precisely what he has in mind.

Mr. Ward: What section of the rules are you referring to, counsel?

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Presiding Examiner: Gentlemen, to avoid any further discussion, I have made my ruling on a much broader basis than that, and I don't think it is relevant to pursue the matter further.

Mr. Ward: Your Honor, I just wanted to make clear, Staff Counsel can't cite the provision of the Commission's rules that require a tender of evidence along with the request that you be permitted to have time to prepare such evidence. It is obviously physically impossible.

Mr. Bardin: You misunderstood me, sir.

Presiding Examiner: My ruling is not based in any way upon the narrower problem raised by Mr. Bardin. My ruling is a very broad one, and the matter raised by Mr. Bardin is not necessarily the purpose of my ruling.

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Mr. Mulvihill: My name is Donald J. Mulvihill.

I request that there be marked for identification the following exhibit of J. Ray McDermott, which is the prepared testimony of Armond F. Quere.

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This consists of three pages, together with Exhibit A, in two pages, together with certification and certificate of service.

Presiding Examiner: There will be identified as Exhibit No. X-72 the prepared testimony of the witness Armand F. Quere, plus the attached exhibit presented by that witness.

(Whereupon the document referred to was marked for identification as Exhibit X-72.)

Mr. Mulvihill: Your Honor, at the same time I would like to note I have deleted therefrom three pages which were included in the initial service. This is a summary of argument of William G. Love, attorney for J. Ray McDermott & Co., Inc. In essence, this summarizes the exhibits contained in Mr. Quere's testimony, showing that in a three-year period the properties committed to the Hope contracts involved herein, under these rate schedules, concerning these properties, there were capital expenditures of $7,652,264.

Presiding Examiner: Why continue summarizing, i view of the fact it is argument and repetitive of what is in the prepared testimony?

Mr. Mulvihill: I am anticipating your excluding it. We submit it in pursuance of paragraph C of the order which states arguments made may be submitted. I request this also be marked for identification.

Presiding Examiner: Actually, the written arguments which

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were distributed by the parties on May 18—and I assumed yours was distributed at the same time, or is this the first time?

Mr. Mulvihill: No, it was also distributed.

Presiding Examiner: Those arguments are now a part of the file, the same as the briefs filed in the proceeding. So I am not going to receive that as an exhibit. You are now offering Exhibit X-72 in evidence?

Mr. Mulvihill: Yes, I am offering Exhibit X-72 in evidence.

Presiding Examiner: This is covered by my ruling of June 18. I ask the reporter to mark it "Excluded—Offer of Proof".

(Whereupon the document heretofore identified as Exhibit X-72 was excluded.)

Mr. Mulvihill: I respectfully except to your ruling.

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Presiding Examiner: I regard this particular evidence as falling into the category described as economic trend evidence, and exclude it on that basis. The reporter will mark it "Excluded—Offer of Proof".

(Whereupon the document heretofore identified as Exhibit X-77 was excluded.)

Presiding Examiner: All right.

Mr. Varner: Mr. Examiner, may it be shown now counsel for Superior makes an offer of proof of all of the matters

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that you exclude and save me going through that with reference to each exhibit?

Presiding Examiner: That won't be necessary.

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Mr. Varner: Mr. Examiner, I would like to have marked for identification the prepared testimony of Raymond A. Kerr, and in connection therewith, Mr. Examiner, I would like to also have marked with a letter to the original identification number the supplemental prepared testimony of Raymond A. Kerr.

Presiding Examiner: When was the supplemental testimony distributed?

Mr. Varner: The supplemental testimony, Your Honor, was distributed after March 18—

Presiding Examiner: May 18.

Mr. Varner: I mean May 18, yes. But I do not recall the exact date. I believe all the parties have received such copies, however.

Mr. Holtzinger: Yes, and I think it was distributed before the hearing.

Mr. Varner: Yes, before the hearing, Your Honor, yes.

Presiding Examiner: Do you have an extra copy?

Off the record.

(Discussion off the record)

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Mr. Bardin: Yes, Your Honor, we offer Exhibit X-61 in evidence.

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Mr. Holtzinger: When did the deliveries by Berkshire

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cease? In other words, the properties were sold to Continental?

Mr. Hillyer: The properties were sold to Continental by instruments actually executed on April 16, 1962. The sales

were effective for accounting purposes as of November 2, 1961. The actual turnover of the physical possession of the properties occurred sometime after April 16, 1962, or perhaps a few days before, I am not exactly certain of that.

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Mr. Holtzinger: Mr. Examiner, I would now like to request that Schedule 39 and Chart 22 of Exhibit No. 12, which was sponsored by the witness J. Rhoads Foster, who was presented by the CATCO producers in Docket No. G-11024, et al., be incorporated by reference. Both of these schedules were attached to the written statement of position which we filed.

In addition, I would request that the Exhibits Nos. 41 and 42, which were sponsored by the witness Chapin, who was presented by the Eastern Seaboard interveners in the CATCO proceedings, likewise be incorporated by reference, and again we have attached both exhibits to the written statement of position which was filed.

Finally, there appears on page 5 of our statement of position the direct examination of the witness Foster and the cross-examination of that witness relating to the Schedule 39 and Chart 22 of Exhibit No. 12, which we would like

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incorporated by reference, and there is also cited in Footnote 4, which appears on page 5, the direct examination of the witness Chapin and the cross-examination of that witness, all of which was concerned with Exhibits 41 and 42 from the CATCO proceeding.

We would like that material likewise to be incorporated by reference.

Mr. Hillyer: Mr. Examiner—

Presiding Examiner: Let me identify it, first.

What is the docket number of that CATCO proceeding?

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Mr. Holtzinger: Docket No. G-11024, et al. It is styled "Continental Oil Company, et al., Docket Nos. G-11024, et al."

Presiding Examiner: For purpose of convenience, I am going to first identify as Item X-D Schedule 39 and Chart 22 of Exhibit 12 from the CATCO proceeding, Continental Oil Company, et al., Docket Nos. G-11024, et al., this being certain exhibit material presented by Dr. Foster in that proceeding.

(Whereupon the material referred to was identified as Item X-D by reference.)

Presiding Examiner: I will also identify as Item X-E the cited testimony of Dr. Foster with relation to this exhibit material from the record in the same proceeding, and this cited testimony is set forth ni the Footnote No. 4,

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on page 5 of the intervenor's written statement of position dated May 18, 1962.

(Whereupon the material referred to was identified as Item X-E by reference.)

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Presiding Examiner: Let me first explore in what respect it would be useful, forgetting for the moment the point raised by Mr. Hillyer. I wonder what respect it would be useful in any significant way to incorporate into this record the cited material, consisting of the in-line price evidence presented by Dr. Foster in the CATCO proceeding?

First, Mr. Bardin, will you inform me with respect to the record as it now stands in our present case, the record now includes substantial in-line price evidence as presented in the portion of Dr. Foster's exhibit and prepared testimony which has already been made a part of this record, is that correct?

Mr. Bardin: That is correct, Your Honor.

Presiding Examiner: All right. Does that evidence—I am merely asking you for the purpose of convenience, although you did not sponsor Dr. Foster's evidence in this hearing—does that evidence include in-line price data with respect to the years in which the contracts involved in this proceeding were executed?

Mr. Bardin: Let me answer your Honor's question indirectly. Perhaps it involves an assumption of the nature of the in-line issue with which I don't agree.

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Presiding Examiner: I don't care about that.

Mr. Bardin: Dr. Foster's evidence includes data relative to in-line price for constracts dated 1957 and 1958.

Presiding Examiner: Let me go back a moment. I am not expressing any view at the moment as to what are the criteria to be used for determining the in-line price for these particular contracts. I am aware of the fact that some of the contracts, or probably most of the contracts involved in this proceeding were executed in the years 1958 and 1959, is that correct?

Mr. Bardin: No, sir, they were all executed in the years 1957 and 1958.

Presiding Examiner: All right, 1957 and 1958.

Does the price data presented by Dr. Foster and received in the record in this proceeding in the session this week include data with respect to prices in effect for the years 1957 and 1958 in the South Louisiana area?

Mr. Bardin: It includes—the data includes prices which were in effect in '57 and '58. It does not try to specify which prices were in effect in 1957, if by "in effect" you mean volumes delivered in 1957.

Presiding Examiner: Then you are telling me if I wanted to—

Mr. Bardin: It shows what contracts were executed on or before the end of the year 1957.

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Presiding Examiner: All right. Are you saying, then, the record, as it stands now—let's assume for the purpose of this discussion—I am not trying to be tricky about this, Mr. Bardin, I am not trying to give away a part of your case—for the purpose of this discussion, if I wanted to find in the record, as made up to this moment, what were the prices for large volume contracts which were in effect in the South Louisiana Area in the years 1957 and 1958, could I find that clearly in our present record?

Mr. Bardin: As I recall, Dr. Foster's material—

Presiding Examiner: Mr. Varner can help me.

Mr. Varner: I don't want to interfere, but I want to assure you it can.

Presiding Examiner: The answer is yes.

Mr. Varner: Yes, Your Honor. Moreover, I believe Your Honor will recall Dr. Foster was asked if he put in substantially the same type of material from the other cases, he said yes. That is my recollection of the record.

Presiding Examiner: All right, I take it, therefore, if the producers, for example, should want to make an argument picking up the sentence which was included by the Commission in its March 7 order, which said where the producers' contracts were for years subsequent to 1956, they might want an opportunity to show that the in-line price for the year of their contracts was different than the CATCO contracts, if

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the producers wanted to make such a showing, are you saying that the data needed for that kind of a showing is now in the record?

Mr. Varner: Yes, sir.

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Presiding Examiner: It seems to me that if anybody in this case would want to make sure that this record includes

detailed data from which an argument could be made that the in-line price for the contracts involved in this proceeding should not be the in-line price as of the year 1956, as determined in Opinion No. 351, but should, instead, be a different alleged in-line price, namely, one purporting to relate

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to the years 1957 and 1958, if anybody should want to make that argument, it would be the producer applicants.

I take it the producer applicants, however, are not filled with enthusiasm with Mr. Holtzinger's proposal to put Dr. Foster's CATCO price data into this record, so it would not serve that purpose, as far as you are concerned?

Mr. Ward: You understate it, Your Honor. I think it is unfair tactics to come forward with materials which that witness presented in a case to which we were not a party, and offer that as an exhibit by identification by reference to the files of the Commission after that witness has stopped off the witness stand and is no longer in a position to defend himself, to defend any statements he made, or may have made there, or any conclusions he drew.

I submit it is highly irregular if you let any evidence in with respect to what that witness said after he is totally unable to defend himself after he left the witness stand.

Presiding Examiner: Mr. Holtzinger, can you explain to me what useful use can be made of this evidence if received by incorporation?

Mr. Holtzinger: We think the Commission could officially notice the CATCO decision, and the Examiner could officially notice it, as stated in our statement. We feel the Foster statement, and field price data, we believe, underlie the price-line decision in the CATCO proceeding, be incorporated

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here simply as a matter of convenience for the parties.

We will take the position in our—and we have taken the

position in our statement of position—that the Commission considered in the CATCO proceedings all of the legally relevant contract prices.

Presiding Examiner: If that is all it is for, Mr. Holtzinger—

Mr. Holtzinger: That is what it was offered for. I am surprised the producers are objecting to the testimony of their own witness be incorporated here.

Presiding Examiner: I expect the hearing to conclude this afternoon. I am going to exclude Items X-D and X-E.

(Whereupon the items heretofore identified as X-D and X-E, by reference, were excluded.)

Presiding Examiner: Will you now identify the other material? Item X-F is the next item. Do you want to assign that to the Chapin Exhibits 41 and 42?

Mr. Holtzinger: Yes, Mr. Examiner.

Presiding Examiner: There is identified as Item X-F the Exhibits 41 and 42, sponsored by the witness Chapin, in the CATCO proceeding, Docket G-11024, et al. For the same reason I stated a moment ago, Item X-F is excluded.

(Whereupon the material referred to was identified as Item X-F by reference and excluded.)

Presiding Examiner: I will also identify as Item X-G

the cited testimony of the witness Chapin relating to those exhibits in the CATCO proceeding, which is cited in detail in Footnote 4, on page 5 of the interveners' statement of position dated May 18.

(Whereupon the testimony referred to was identified as Item X-G by reference.)

Presiding Examiner: Item X-G is excluded.

(Whereupon the testimony referred to, heretofore identified as Item X-G by reference, was excluded.)

EXHIBITS

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Hearing Exhibit No. X-2

TESTIMONY OF ROBERT M. WEDDLE

Q. What were the results of the three (3) company-wide cost-of-service studies we have just been discussing? A. The three (3) cost-of-service studies show a unit revenue per MCF of 18.7¢ under each of the three (3) allocation methods. The unit cost of jurisdictional gas is 23.1¢ per MCF using the BTU content Allocation method; 24.9¢ per MCF using the Reservoir Space and Relative Cost Allocation; and 16.8¢ per Mcf using the Relative Cost and Modified BTU Allocation. The current costs excluding an allowance for return on rate base and for taxes on income exceeds unit revenue by 4.4¢ per MCF using the BTU Content Allocation method, and 6.2¢ per MCF using the Reservoir Space and Relative Cost Allocation. Under the Relative Cost and Modified BTU Content Allocations method there is a unit income before allowance for return on rate base and for taxes on income in the amount of 1.9¢ per MCF. This 1.9¢ per MCF unit income represents a 1.5% return before allowance for taxes on income.

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Q. What were the results of the three (3) summaries? A. There was a deficiency of 5.0¢ per MCF under the BTU content allocation method, Schedule 1; a deficiency of 6.8¢ per MCF under the Reservoir Space and Relative Cost Allocation method, Schedule 2; and an excess of 1.3¢ per MCF under the Relative Cost and Modified BTU Allocation method, Schedule 3 after deducting current cost from

income but before any allowance for return on rate base or allowance for income taxes.

721

A return before taxes on income of 24.5%, 28.0%, and 18.4% is shown on the rate base allocated to liquids under the "BTU Content," the "Reservoir Space and Relative Cost," and the "Relative Cost and Modified BTU Methods," respectively. Nothing is available for return on the rate base applicable to gas under the BTU Content, and Reservoir Space and Relative Cost methods, Schedules 1 and 2, because of the deficiencies noted. However, a 1.0% return is shown under the Relative Cost and Modified BTU method before allowance for taxes on income.

Q. What is the overall return on the combined oil and gas rate base? A. The return on the combined rate base is 8.6% before an allowance for taxes on income.

Q. What effect would the reduction of any contract rate have on the combined rate of return for Placid Oil Company? A. Any reduction of the price per MCF would reduce the combined rate before allowances for taxes on income below the 8.6%.

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PLACID OIL COMPANY PRODUCTION—SUMMARY OF OIL AND GAS PRODUCTION OPERATIONS
PER VENTURE ACCOUNTING COST OF SERVICE USING BTU CONTENT ALLOCATIONS FOR YEAR ENDED DECEMBER 31, 1960

Income	OIL Barrels	OIL Amount	OIL $ Per Bbl	GAS MCF	GAS Amount	GAS ¢ Per MCF	Total Amount
1. Oil (per books)	5,907,490	$17,157,400	$2.904				$22,336,536
2. Gas (From Schedule 2 Exhibit POC) 1				28,685,602	$ 5,179,136	18.1¢	
Current Costs							
3. Operating expenses		$ 2,771,488	$ .469		$ 1,132,547	4.0¢	$ 3,904,035
4. Depreciation, depletion, and amortization		2,551,927	.432		1,625,442	5.7	4,177,369
5. General and administrative expense		482,944	.082		408,182	1.4	891,126
6. Exploration expense		3,167,895	.536		2,878,861	10.0	6,046,756
7. Severance Taxes		1,028,527	.174		530,502	1.9	1,559,029
8. Regulatory commission expenses					40,000	.1	40,000
9. Total Current Costs		$10,002,781	$1.693		$ 6,615,534	23.1¢	$16,618,315
10. Balance available for return on rate base and allowance for taxes on income		$ 7,154,619	$1.211		$(1,436,398)*	(5.0¢)*	$ 5,718,221
11. Total net property investment and working capital allowance (From Schedule 9 Exhibit POC) 1		$29,251,323			$36,896,371		$66,147,694
12. Unamortized balance of regulatory commission expense					80,000		80,000
13. Total rate base		$29,251,323	$4.952		$36,976,371		$66,227,694
14. Per cent (line 10 ÷ line 13)		24.5%					8.6%

* Deficiency

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(801)

PLACID OIL COMPANY PRODUCTION—SUMMARY OF OIL AND GAS PRODUCTION OPERATIONS
PER VENTURE ACCOUNTING COST OF SERVICE USING RESERVOIR SPACE AND RELATIVE COST ALLOCATIONS FOR YEAR ENDED DECEMBER 31, 1960

(802)

Income	OIL Barrels	OIL Amount	OIL $ Per Bbl	GAS MCF	GAS Amount	GAS ¢ Per MCF	Total Amount
1. Oil (per books)	5,907,490	$17,157,400	$2.904				$22,336,536
2. Gas (From Schedule 2 Exhibit POC) 2				28,685,602	$ 5,179,136	18.1¢	
Current Costs							
3. Operating expense		$ 2,967,436	$ .502		$ 936,599	3.3¢	$ 3,904,035
4. Depreciation, depletion, and amortization		2,759,398	.467		1,417,971	4.9	4,177,369
5. General and administration expense		494,991	.084		396,135	1.4	891,126
6. Exploration expense		2,222,183	.376		3,824,573	13.3	6,046,756
7. Severance taxes		1,028,527	.174		530,502	1.9	1,559,029
8. Regulatory commission expense					40,000	.1	40,000
9. Total Current Costs		$ 9,472,535	$1.603		$ 7,145,780	24.9¢	$16,618,315
10. Balance available for return on rate base and allowance for taxes on income		$ 7,684,865	$1.301		$(1,966,644)*	(6.8¢)*	$ 5,718,221
11. Total net property investment and working capital allowance (From Schedule 9 Exhibit POC) 2		$27,492,813			$38,654,881		$66,147,694
12. Unamortized balance of regulatory commission expense					80,000		80,000
13. Total rate base		$27,492,813	$4.654		$38,734,881		$66,227,694
14. Per cent (line 10 ÷ line 13)		28.0%					8.6%

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PLACID OIL COMPANY PRODUCTION—SUMMARY OF OIL AND GAS PRODUCTION OPERATIONS
PER VENTURE ACCOUNTING COST OF SERVICE USING RELATIVE COST AND MODIFIED BTU ALLOCATIONS FOR YEAR ENDED DECEMBER 31, 1960

Income	Barrels	OIL Amount	$ Per Bbl	MCF	GAS Amount	¢ Per MCF	Total Amount
1. Oil (per books)	5,907,490	$17,157,400	$2.904				$22,336,536
2. Gas (From Schedule 2 Exhibit POC) 3				28,685,600	$ 5,179,136	18.1¢	
Current Costs							
3. Operating expenses		$ 2,958,287	$ .501		$ 945,748	3.3¢	$ 3,904,035
4. Depreciation, depletion, and amortization		2,747,021	.465		1,430,348	5.0	4,177,369
5. General and administrative expense		514,063	.087		377,063	1.3	891,126
6. Exploration expense		4,558,649	.772		1,488,107	5.2	6,046,756
7. Severance taxes		1,028,527	.174		530,502	1.9	1,559,029
8. Regulatory commission expenses					40,000	.1	40,000
9. Total Current Costs		$11,806,547	$1.999		$ 4,811,768	16.8¢	$16,618,315
10. Balance available for return on rate base and allowance for taxes on income		$ 5,350,853	$ .905		$ 367,368	1.3¢	$ 5,718,221
11. Total net property investment and working capital allowance (From Schedule 9 Exhibit POC) 3		$29,048,397			$37,099,297	1.293	$66,147,694
12. Unamortized balance of regulatory commission expense					80,000	.003	80,000
13. Total rate base		$29,048,397	$4.917		$37,179,297	$1.296	$66,227,694
14. Per cent (line 10 ÷ line 13)		18.4%			1.0%		8.6%

803

(803)

(807)

Hearing Exhibit No. X-8

SUMMARY OF SOUTH LOUISIANA OIL AND GAS PRODUCTION OPERATIONS PER VENTURE ACCOUNTING COST OF SERVICE USING GROSS REVENUE REALIZATION AND MODIFIED BTU CONTENT ALLOCATIONS FOR YEAR ENDED DECEMBER 31, 1960

	Oil		Jurisdictional Gas		Nonjurisdictional Gas		Total
	Amount	¢ Per Bbl.	Amount	¢ Per MCF	Amount	¢ Per MCF	Amount
Income							
Oil (per books)							
1. Barrels	1,985,185						
2. Amount	$ 5,781,304	$ 2.912					
Jurisdictional Gas (From Schedule 2)							
3. MCF			11,904,257				
4. Amount			$ 2,550,943	21.4¢			
Nonjurisdictional Gas (From Schedule 2)							
5. MCF					332,917		
6. Amount					$ 43,482	13.1¢	$ 8,375,729
Current Costs							
7. Operating expenses	$ 781,203	$ .394	$ 436,763	3.7¢	$ 12,212	3.7¢	$ 1,230,178
8. Depreciation, depletion and amortization	1,391,073	.701	568,838	4.8	15,905	4.8	1,975,816
9. General and administrative expense	311,901	.157	182,254	1.5	5,096	1.5	499,251
10. Exploration expense	1,410,446	.710	617,307	5.2	17,260	5.2	2,045,013
11. Severance Taxes	431,752	.217	276,547	2.3	7,733	2.3	716,032
12. Regulatory commission expense $40,000—South Louisiana portion 45.75% (Factor from Schedule 2)			18,300	0.2			18,300
13. Total Current Costs	$ 4,326,375	$ 2.179	$ 2,100,009	17.7¢	$ 58,206	17.5¢	$ 6,484,590

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SUMMARY OF SOUTH LOUISIANA OIL AND GAS PRODUCTION OPERATIONS
PER VENTURE ACCOUNTING COST OF SERVICE USING
GROSS REVENUE REALIZATION AND MODIFIED BTU CONTENT ALLOCATIONS
FOR YEAR ENDED DECEMBER 31, 1960

	Oil		Jurisdictional Gas		Nonjurisdictional Gas		Total
	Amount	¢ Per Bbl.	Amount	¢ Per MCF	Amount	¢ Per MCF	Amount
14. Balance available for return on rate base and allowance for taxes on income	$ 1,454,929	$ .733	$ 450,934	3.7¢	$ (14,724)*	(4.4¢)*	$ 1,891,139
15. Total net property investment and working capital allowance (From Schedule 4 Line 25)	$24,361,586	$12.272	$14,888,189	$ 1.251	$ 416,282	$1.250	$39,666,066
16. Unamortized balance of regulatory commission expense $80,000 —South Louisiana portion 45.75% (Factor from Schedule 2)			36,600	.003			36,600
17. Total Rate Base	$24,361,586	$12.272	$14,924,798	$ 1.254	$ 416,282	$1.250	$39,702,666
18. Per Cent (Line 14 ÷ line 17)	5.97%		3.02%		—		4.76%
19. Net Property Investment (From Schedule 4)	$23,537,483	$11.857	$14,497,038	$ 1.218	$ 405,345	$1.218	$38,439,866
20. Return on net property investment (23% of line 19)	$ 5,413,621	$ 2.727	$ 3,334,319	23.0¢	$ 93,229	23.0¢	$ 8,841,169
21. Balance available for return (Line 14 above)	1,454,929	.733	450,934	3.7	(14,724)	(4.4)	1,891,139
22. Deficiency (Line 21 minus Line 20)	$(3,958,692)*	$(1.994)*	$(2,883,385)*	(24.3¢)*	$(107,953)*	(32.4¢)*	$(6,950,030)*

* Deficiency

261

308

(308)

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Hearing Exhibit No. X-13

HASSIE HUNT TRUST (Docket No. G-14109)
CAROLINE HUNT SANDS (Docket No. G-17398)
PLACID OIL COMPANY (Docket Nos. 13183-4)

TESTIMONY OF JARMAN BASS

Q. Please state your name and address. A. My name is Jarman Bass. I live at 4001 Marquette Avenue, Dallas 25, Texas.

Q. With whom are you associated, and in what capacity? A. I am a partner in the firm of Arthur Andersen & Co., an international firm of accountants and auditors. We have offices in most of the major cities of the United States and in several foreign countries. We also have arrangements with accounting firms in other parts of the world through which we operate in many other foreign countries. My office is located at 1507 Pacific Avenue, Dallas, Texas.

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Q. What was Arthur Andersen & Co. employed to do in connection with this proceeding? A. We were advised that Hassie Hunt Trust, Caroline Hunt Sands and Placid Oil Company had these proceedings pending before the Commission involving the price of gas sold from certain properties in South Louisiana. We were requested to make appropriate cost studies of the gas operations of the three organizations mentioned and to be prepared to testify in this hearing.

Q. Have you made such studies? A. Yes, I have.

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Q. Did you consider the possibility of trying to obtain area-type cost data from producers in South Louisiana for introduction by these three organizations in this specific certificate hearing? A. Yes, I did. We were concerned, however, with whether we had enough time to accumulate such data and, also, whether we could obtain access to the cost records of enough companies to make such a project meaningful.

As a general indication of the time required in such a project, I was instructed by counsel to read portions of the transcript appearing in Volume 2 of Permian Basin Area Rate Proceeding (Docket AR 61-1) Pre-Hearing Conference held on March 7, 1961, in which lawyers for some of the respondents estimated the amount of time required to compile the information requested

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by the then proposed FPC Staff cost questionnaire. On my own initiative, I also asked representatives of other oil and gas producers how much time their companies actually spent in completing Appendices A and B of the Staff's Permian Basin Area Cost Questionnaire. Based on what I read and was told, I believe the accumulation of area-type cost information (without putting it into final cost-of-service form) would probably require time in a range between 200 and 50,000 man hours per company, depending on the size of the company and the condition of its records.

I then considered the number of companies from which we would have to obtain information in order for such a study to be meaningful. According to the FPC Order dated May 10, 1961, in Dockets No. AR 61-2, et al (the South Louisiana Area Rate matter) there were approxi-

mately 200 producers selling gas from fields located in the general South Louisiana area in which the gas, the subject of this proceeding, is produced. From these producers, it would appear necessary to obtain cost information from sufficient companies to constitute a representative group in terms of number and size of producers as well as volume of gas produced.

After considering the possible man-hour time per company and the possible number of companies that would have to be contacted, we abandoned any thought of accumulating area-type cost information for this specific certificate hearing because of the obviously prohibitive cost of the effort involved.

Q. What conclusions do you draw from all the studies you made? A. Looking first at Schedules 1, the top summaries in the entity-wide gas cost studies, Exhibits HHT 1 through HHT 5, CHS 1 through

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CHS 3 and POC 1 through POC 3, I believe it is obvious that, on an overall basis, the gas prices which are the subject of these proceedings, as well as all rates proposed by these three organizations, are inadequate when compared with costs determined under any of the methods shown. A reference to Exhibits HHT 6, CHS 4 and POC 4 also points to the conclusion that, generally, these three organizations are earning only a modest return on their substantial investment in properties devoted to the production and sale of oil and other liquids.

It is also interesting to consider the 1960 combined oil, liquid and gas operating results for each of the three organizations as shown in Exhibits HHT 6, CHS 4 and POC 4. In the case of both Hassie Hunt Trust and Caroline Hunt Sands, combined oil, liquid and gas current costs

actually exceeded combined oil, liquid and gas income (including proposed gas rate increases), so that there was no money left to provide for return on the combined oil, liquid and gas investment. In the case of Placid Oil Company, combined oil, liquid and gas operations showed a return on combined investment of less than 10 per cent, without anything for income taxes.

With more specific reference to the cost of gas in South Louisiana, the Catco-Opinion 351-type cost determinations shown in Exhibits HHT 8, CHS 6 and POC 6 more than support the 23.55¢ price (at 15.025 pounds psia; 22.96¢ at 14.65 pounds psia) at which the subject gas sales were certificated.

The historical cost information presented for Hassie Hunt Trust illustrates a pattern of cost increases over the past few years that is being experienced by many independent producers

of natural gas. In this connection, it is interesting to compare the cost showing and gas prices then under investigation in the Hassie Hunt Trust rate case (Dockets G-9554 et al) with the results of the Trust's 1960 gas cost studies and the 23.55¢ price certificated for the gas sales questioned in this proceeding. This comparison is made on Exhibit HHT 9.

In the Hassie Hunt Trust rate case, I understand the Commission, after considering all the evidence but without making any specific findings as to cost, approved gas prices ranging from 14.4¢ to 18.0¢ per MCF. The record in that case included the Trust's cost showing of 20.0¢ and 22.9¢ (depending on the allocation method) *without* any allowance for return and income taxes.

(897)

In these proceedings, the certificated gas price is 23.55¢ (15.025 pounds psia)—only 5¢ more than the highest price approved by the Commission in Hassie Hunt Trust Dockets G-9554 et al. I believe this difference in price is more than supported, if the substantial increases in gas costs (determined and compared under identical allocation methods) are to be given any consideration.

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Hearing Exhibit No. X-14

TESTIMONY OF JOSEPH E. SAAR

IN DOCKET NOS. G-14109 AND G-17398

Q. Please state your name and address. A. My name is Joseph Saar. I live in Dallas, Texas.

Q. With whom are you associated and in what capacity? A. I am a senior accountant with Arthur Andersen & Co., an international firm of accountants and auditors with offices in most of the major cities of the United States and several foreign countries. My office is located at 1507 Pacific Avenue, Dallas, Texas.

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Q. What were the results of the 8 entity-wide cost-of-service studies we have just been discussing? A. The results are as follows:

Exhibit Number	Type of Study and Allocation Method	Per MCF at 14.65 # psia Revenue	Cost of Jurisdictional Gas	Income (Deficiency) Before Allowance for Return on Rate Base or Taxes on Income
	HASSIE HUNT TRUST—			
	BTU Content Allocations:			
HHT 1	1960	17.9¢	39.4¢	(21.5)¢
HHT 2	1957	16.3	20.0	(3.7)
	Reservoir Space and Relative Cost Allocations:			
HHT 3	1960	17.9	47.4	(29.5)
HHT 4	1957	16.3	22.9	(6.6)
	Relative Cost and Modified BTU Allocations:			
HHT 5	1960	17.9	31.7	(13.8)
	CAROLINE HUNT SANDS— BTU Content Allocations:			
CHS 1	1960	20.3	30.8	(10.5)
	Reservoir Space and Relative Cost Allocations:			
CHS 2	1960	20.3	34.1	(13.8)
	Relative Cost and Modified BTU Allocations:			
CHS 3	1960	20.3	26.1	(5.8)

SCHEDULE 1

Hearing Exhibit No. X-15 (excerpt)

SUMMARY OF JURISDICTIONAL GAS OPERATIONS

Description	Amount	Average Cents/MCF
	(a)	(b)
1. JURISDICTIONAL GAS DELIVERIES (From Schedule 2)	6,952,886 MCF	—
2. ANNUAL INCOME, giving effect to proposed rate changes (From Schedule 2)	$ 1,243,467	17.9¢
CURRENT COSTS, excluding return on rate base and allowance for taxes on income		
3. Operating, depreciation, depletion and amortization, general and administrative and exploration expenses (From Schedule 3)	$ 2,651,562	
4. Purchased gas (From Schedule 8)	67,902	
5. Regulatory commission expense (From Schedule 9)	20,000	
6. Total current costs, as described	$ 2,739,464	39.4
7. (DEFICIENCY) before allowance for return on rate base or taxes on income	$(1,495,997)	(21.5)¢
8. RATE BASE (From Schedule 10)	$ 8,605,712	

951 SCHEDULE 1

Hearing Exhibit No. X-16 (excerpt)

SUMMARY OF JURISDICTIONAL GAS OPERATIONS

	Description	Amount	Average Cents/MCF
		(a)	(b)
1.	JURISDICTIONAL GAS DELIVERIES (From Schedule 2)	6,534,336 MCF	—
2.	ANNUAL INCOME, giving effect to proposed rate changes (From Schedule 2)	$1,063,385	16.3¢
	CURRENT COSTS, excluding return on rate base and allowance for taxes on income		
3.	Operating, depreciation, depletion and amortization, general and administrative and exploration expenses (From Schedule 3)	$1,133,895	
4.	Purchased gas From Schedule 8)	151,449	
5.	Regulatory commission expense (From Schedule 9)	20,000	
6.	Total current costs, as described	$1,305,344	20.0¢
7.	DEFICIENCY, before allowance for return on rate base or taxes on income	$ 241,951	3.7¢
	RATE BASE—		
8.	Net property investment and working capital allowance (From Schedule 10)	$6,013,005	
9.	Deferred regulatory commission expense (From Schedule 9)	40,000	
10.	Total	$6,053,005	

SCHEDULE 1

Hearing Exhibit No. X-17 (excerpt)

SUMMARY OF JURISDICTIONAL GAS OPERATIONS

Description	Amount	Average Cents/MCF
	(a)	(b)
1. JURISDICTIONAL GAS DELIVERIES (From Schedule 2)	6,952,886 MCF	—
2. ANNUAL INCOME, giving effect to proposed rate changes (From Schedule 2)	$ 1,243,467	17.9¢
CURRENT COSTS, excluding return on rate base and allowance for taxes on income		
3. Operating, depreciation, depletion and amortization, general and administrative and exploration expenses (From Schedule 3)	$ 3,204,560	
4. Purchased gas (From Schedule 8)	67,902	
5. Regulatory commission expense (From Schedule 9)	20,000	
6. Total current costs, as described	$ 3,292,462	47.4
7. (DEFICIENCY) before allowance for return on rate base or taxes on income	$(2,048,995)	(29.5)¢
8. RATE BASE (From Schedule 10)	$10,235,727	

Hearing Exhibit No. X-18 (excerpt)

SUMMARY OF JURISDICTIONAL GAS OPERATIONS

	Description	Amount	Average Cents/MCF
		(a)	(b)
1.	JURISDICTIONAL GAS DELIVERIES (From Schedule 2)	6,534,336 MCF	—
2.	ANNUAL INCOME, giving effect to proposed rate changes (From Schedule 2)	$1,063,393	16.3¢
	CURRENT COSTS, excluding return on rate base and allowance for taxes on income		
3.	Operating, depreciation, depletion and amortization, general and administrative and exploration expenses (From Schedule 3)	$1,322,639	
4.	Purchased gas From Schedule 8)	151,449	
5.	Regulatory commission expense (From Schedule 9)	20,000	
6.	Total current costs, as described	$1,494,088	22.9¢
7.	DEFICIENCY, before allowance for return on rate base or taxes on income	$ 430,695	6.6¢
	RATE BASE—		
8.	Net property investment and working capital allowance (From Schedule 10)	$6,903,065	
9.	Deferred regulatory commission expense (From Schedule 9)	40,000	
10.	Total	$6,943,065	

SCHEDULE 1

Hearing Exhibit No. X-19 (excerpt)

SUMMARY OF JURISDICTIONAL GAS OPERATIONS

Description	Amount	Average Cents/MCF
	(a)	(b)
1. JURISDICTIONAL GAS DELIVERIES (From Schedule 2)	6,952,886 MCF	—
2. ANNUAL INCOME, giving effect to proposed rate changes (From Schedule 2)	$1,243,467	17.9¢
CURRENT COSTS, excluding return on rate base and allowance for taxes on income		
3. Operating, depreciation, depletion and amortization, general and administrative and exploration expenses (From Schedule 3)	$2,118,183	
4. Purchased gas (From Schedule 8)	67,902	
5. Regulatory commission expense (From Schedule 9)	20,000	
6. Total current costs, as described	$2,206,085	31.7¢
7. (DEFICIENCY), before allowance for return on rate base or taxes on income	$ (962,618)	(13.8)¢
8. RATE BASE (From Schedule 10)	$8,112,248	
9. Less—Gas portion of cash for lease plays	50,465	
10. RATE BASE (excluding cash for lease plays)	$8,061,783	

Hearing Exhibit

HASSIE HUNT TRUST

SUMMARY OF OIL AND GAS PRODUCTION OPERATIONS
PER VENTURE ACCOUNTING COST OF SERVICE USING RELATIVE COST AND
MODIFIED BTU ALLOCATIONS FOR THE TEST YEAR 1960

	Description	Oil and Liquids				
		Barrels (a)	Amount (b)	Per Bbl. (c)	MCF at 14.65 psi (d)	
	INCOME:					
1.	Oil, based on book revenues	1,540,095	$4,675,147	$3.04		
2.	Gas (From Schedule 2, Exhibit HHT 5)				8,722,074	$
	CURRENT COSTS:					
3.	Operating expenses		$ 629,054	$ .41		$
4.	Depreciation, depletion and amortization		777,130	.50		
5.	General and administrative expenses		88,972	.06		
6.	Exploration expenses		2,882,464	1.87		
7.	Severance taxes		311,527	.20		
8.	Regulatory expenses					
9.	Purchased gas					
10.	Total current costs		$4,689,147	$3.04		$
11.	BALANCE (DEFICIENCY) available for return on rate base and allowance for taxes on income		$ (14,000)	$ -		$
12.	TOTAL RATE BASE		$8,097,630			$
13.	PER CENT (line 11 ÷ line 12)		- %			

NOTE: Unit gas income and costs are based on test year sales volumes which incl jurisdictional produced and purchased gas and nonjurisdictional produce gas volumes. The inclusion of test year nonjurisdictional produced gas volumes accounts for the nominal differences in unit gas income and cur costs per this schedule and Schedule 1 of Exhibit HHT 5.

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SCHEDULE 3

HASSIE HUNT TRUST

SUMMARY OF OIL AND GAS PRODUCTION OPERATIONS
VENTURE ACCOUNTING COST OF SERVICE USING RELATIVE COST AND
MODIFIED BTU ALLOCATIONS FOR THE TEST YEAR 1960

Oil and Liquids			Gas			
Barrels (a)	Amount (b)	Per Bbl. (c)	MCF at 14.65 psi (d)	Amount (e)	Per MCF (Note) (f)	Total Amount (g)
1,540,095	$4,675,147	$3.04				)
			8,722,074	$ 1,520,374	17.43 ¢	) $ 6,195,521
	$ 629,054	$ .41		$ 245,119	2.81 ¢	$ 874,173
	777,130	.50		1,194,455	13.69	1,971,585
	88,972	.06		115,489	1.32	204,461
	2,882,464	1.87		1,003,732	11.51	3,886,196
	311,527	.20		151,612	1.74	463,139
				20,000	.23	20,000
				67,902	.78	67,902
	$4,689,147	$3.04		$ 2,798,309	32.08 ¢	$ 7,487,456
	$ (14,000)	$ -		$(1,277,935)	(14.65)¢	$(1,291,935)
	$8,097,630			$10,369,172		$18,466,802
	- %			- %		- %

as income and costs are based on test year sales volumes which include
sdictional produced and purchased gas and nonjurisdictional produced
volumes. The inclusion of test year nonjurisdictional produced gas
mes accounts for the nominal differences in unit gas income and current
s per this schedule and Schedule 1 of Exhibit HHT 5.

HASSIE HUNT TRUST

SUMMARY OF 1960 COST OF GAS SERVICE

Hearing

	Description	Entity-Wide Using Relative Cost and Modified BTU Allocations		South Louisiana Area Using Gross Revenue Realization and Modif BTU Allocations (Note	
		Amount	Cents Per MCF	Amount	Cents Per MC
1.	TOTAL JURISDICTIONAL GAS DELIVERIES (MCF) at 14.65# psia pressure base (exclusive of 623,666 MCF of purchased gas sales in 1960)	6,329,220	-	3,111,675	-
2.	ANNUAL INCOME, at approved or proposed rates (exclusive of purchased gas sales of $98,150)	$ 1,145,317	18.1 ¢	$ 638,285	20.5
	CURRENT COSTS:				
3.	Operating expenses	$ 191,560	3.0 ¢	$ 70,354	2.3
4.	Depreciation, depletion and amortization	933,467	14.8	294,439	9.5
5.	General and administrative expenses	90,255	1.4	39,516	1.3
6.	Severance and gathering taxes	118,485	1.9	69,912	2.2
7.	Regulatory expenses	20,000	.3	9,102	.3
8.	Return on net property investment at 23%	1,726,497	27.3	484,373	15.5
9.	Total	$ 3,080,264	48.7 ¢	$ 967,696	31.1
	EXPLORATORY COSTS:				
10.	Entity-wide exploration expenses	$ 784,416	12.4 ¢	$ 385,848	12.4
11.	Entity-wide return on exploration net property investment at 23%	65,817	1.0	32,361	1.0
12.	Total	$ 850,233	13.4 ¢	$ 418,209	13.4
13.	Total costs	$ 3,930,497	62.1 ¢	$1,385,905	44.5
14.	(DEFICIENCY)	$(2,785,180)	(44.0)¢	$ (747,620)	(24.0

NOTES:
(1) This includes all of the Trust's 1960 gas sales in the South Louisiana Area as defined by th Commission in Docket No. AR 61-2.
(2) This includes 1960 gas sales made under rate schedule 19 which is the subject of Docket No.

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HASSIE HUNT TRUST

SUMMARY OF 1960 COST OF GAS SERVICE

Hearing Exhibit No. X-22 (1043)

	Entity-Wide Using Relative Cost and Modified BTU Allocations		South Louisiana Area Using Gross Revenue Realization and Modified BTU Allocations (Note 1)		Sales Under Rate Schedule 19 Using Gross Revenues and Modified BTU Allocations (Note 2)	
	Amount	Cents Per MCF	Amount	Cents Per MCF	Amount	Cents Per MCF
at 14.65# psia of purchased gas	6,329,220	-	3,111,675	-	233,605	-
es (exclusive	$ 1,145,317	18.1 ¢	$ 638,285	20.5 ¢	$ 53,641	23.0 ¢
	$ 191,560	3.0 ¢	$ 70,354	2.3 ¢	$ 6,225	2.7 ¢
	933,467	14.8	294,439	9.5	25,244	10.8
	90,255	1.4	39,516	1.3	2,961	1.3
	118,485	1.9	69,912	2.2	5,239	2.2
	20,000	.3	9,102	.3	701	.3
	1,726,497	27.3	484,373	15.5	58,765	25.2
	$ 3,080,264	48.7 ¢	$ 967,696	31.1 ¢	$ 99,135	42.5 ¢
	$ 784,416	12.4 ¢	$ 385,848	12.4 ¢	$ 28,967	12.4 ¢
operty	65,817	1.0	32,361	1.0	2,429	1.0
	$ 850,233	13.4 ¢	$ 418,209	13.4 ¢	$ 31,396	13.4 ¢
	$ 3,930,497	62.1 ¢	$1,385,905	44.5 ¢	$130,531	55.9 ¢
	$(2,785,180)	(44.0)¢	$ (747,620)	(24.0)¢	$(76,890)	(32.9)¢

e Trust's 1960 gas sales in the South Louisiana Area as defined by the Federal Power No. AR 61-2.
sales made under rate schedule 19 which is the subject of Docket No. G-14109.

FEDERAL POWER COMMISSION
Docket No. G-13183, et al.
Hearing Ex. No. X-22
Date Identified 6/19/62
Date Admitted EXCLUDED 6/19/62
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1049

SCHEDULE 1

Hearing Exhibit No. X-24 (excerpt)

SUMMARY OF JURISDICTIONAL GAS OPERATIONS

Description	Amount	Average Cents/MCF
	(a)	(b)
1. JURISDICTIONAL GAS DELIVERIES (From Schedule 2)	795,027 MCF	—
2. ANNUAL INCOME (From Schedule 2)	$ 161,086	20.3¢
3. CURRENT COSTS, excluding return on rate base and allowance for taxes on income (From Schedule 3)	244,414	30.8¢
4. (DEFICIENCY) before allowance for return on rate base or taxes on income	$ (83,328)	(10.5)¢
5. RATE BASE (From Schedule 3)	$ 942,619	

SCHEDULE 1

Hearing Exhibit No. 25 (excerpt)

SUMMARY OF JURISDICTIONAL GAS OPERATIONS

Description	Amount	Average Cents/MCF
	(a)	(b)
1. JURISDICTIONAL GAS DELIVERIES (From Schedule 2)	795,027 MCF	—
2. ANNUAL INCOME (From Schedule 2)	$ 161,086	20.3¢
3. CURRENT COSTS, excluding return on rate base and allowance for taxes on income (From Schedule 3)	270,915	34.1¢
4. (DEFICIENCY) before allowance for return on rate base or taxes on income	$ (109,829)	(13.8)¢
5. RATE BASE (From Schedule 3)	$ 968,193	

1090

SCHEDULE 1

Hearing Exhibit No. X-26 (excerpt)

SUMMARY OF JURISDICTIONAL GAS OPERATIONS

Description	Amount	Average Cents/MCF
	(a)	(b)
1. JURISDICTIONAL GAS DELIVERIES (From Schedule 2)	795,027 MCF	—
2. ANNUAL INCOME, giving effect to proposed rate changes (From Schedule 2)	$ 161,086	20.3¢
3. CURRENT COSTS, excluding return on rate base and allowance for taxes on income (From Schedule 3)	207,413	26.1¢
4. (DEFICIENCY) before allowance for return on rate base or taxes on income	$ (46,327)	(5.8)¢
5. RATE BASE (From Schedule 9)	$ 902,994	
6. Less—Gas portion of cash for lease plays	9,313	
7. RATE BASE (excluding cash for lease plays)	$ 893,681	

CAROLINE HUNT SANDS

SUMMARY OF OIL AND GAS PRODUCTION OPERATIONS
PER VENTURE ACCOUNTING COST OF SERVICE USING RELATIVE COST
AND MODIFIED BTU ALLOCATIONS FOR THE TEST YEAR 1960

	Description	Oil and Liquids			Gas		
		Barrels (a)	Amount (b)	Per Bbl. (c)	MCF at 14.65 psi (d)	Amount (e)	Per MCF (f)
	INCOME:						
1.	Oil, based on book revenues	88,409	$248,979	$2.82			
2.	Gas (From Schedule 2, Exhibit CHS - 3)				1,255,847	$ 202,194	16.1 ¢
	CURRENT COSTS:						
3.	Operating expenses		$ 39,920	$ .45		$ 41,105	3.3 ¢
4.	Depreciation, depletion and amortization		80,804	.91		96,378	7.7
5.	General and administrative expenses		4,730	.06		7,834	.6
6.	Exploration expenses		142,454	1.61		157,388	12.5
7.	Severance taxes		13,827	.16		19,646	1.5
8.	Regulatory expenses					3,333	.3
9.	Total current costs		$281,735	$3.19		$ 325,684	25.9 ¢
10.	BALANCE (DEFICIENCY) available for return on rate base and allowance for taxes on income		$(32,756)	$(.37)		$ (123,490)	(9.8)¢
11.	TOTAL RATE BASE		$864,223			$1,422,441	
12.	PER CENT (Line 10 ÷ Line 11)		- %			- %	

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CAROLINE HUNT SANDS

SCHEDULE 3

ARY OF OIL AND GAS PRODUCTION OPERATIONS
ACCOUNTING COST OF SERVICE USING RELATIVE COST
IFIED BTU ALLOCATIONS FOR THE TEST YEAR 1960

Oil and Liquids			Gas			
Barrels (a)	Amount (b)	Per Bbl. (c)	MCF at 14.65 psi (d)	Amount (e)	Per MCF (f)	Total Amount (g)
88,409	$248,979	$2.82				)
			1,255,847	$ 202,194	16.1 ¢	)$ 451,173
	$ 39,920	$ .45		$ 41,105	3.3 ¢	$ 81,025
	80,804	.91		96,378	7.7	177,182
	4,730	.06		7,834	.6	12,564
	142,454	1.61		157,388	12.5	299,842
	13,827	.16		19,646	1.5	33,473
				3,333	.3	3,333
	$281,735	$3.19		$ 325,684	25.9 ¢	$ 607,419
	$(32,756)	$(.37)		$ (123,490)	(9.8)¢	$ (156,246)
	$864,223			$1,422,441		$2,286,664
	- %			- %		- %

CAROLINE HUNT SANDS

Hear

SUMMARY OF 1960 COST OF GAS SERVICE

Description	Entity-Wide Using Relative Cost and Modified BTU Allocations		South Louisiana Using Gross Reve Realization and Mo BTU Allocations (N	
	Amount	Cents Per MCF	Amount	Ce Per
1. TOTAL JURISDICTIONAL GAS DELIVERIES (MCF) at 14.65# psia pressure base	795,027	-	725,689	
2. ANNUAL INCOME, at approved or proposed rates	$ 161,086	20.3 ¢	$ 151,208	20
CURRENT COSTS:				
3. Operating expenses	$ 26,024	3.3 ¢	$ 21,879	3
4. Depreciation, depletion and amortization	61,017	7.7	42,240	5
5. General and administrative expenses	4,960	.6	4,354	
6. Severance and gathering taxes	12,438	1.6	16,691	2
7. Regulatory expenses	3,333	.4	2,903	
8. Return on net property investment at 23%	190,482	24.0	158,460	21
9. Total	$ 298,254	37.6 ¢	$ 246,527	33
EXPLORATORY COSTS:				
10. Entity-wide exploration expenses	$ 99,641	12.5 ¢	$ 90,711	12
11. Entity-wide return on exploration net property investment at 23%	10,562	1.3	9,434	1
12. Total	$ 110,203	13.8 ¢	$ 100,145	13
13. Total costs	$ 408,457	51.4 ¢	$ 346,672	47
14. (DEFICIENCY)	$(247,371)	(31.1)¢	$(195,464)	(26

NOTES:

(1) This includes all of Caroline Hunt Sands' 1960 gas sales in the South Louisiana Area as Federal Power Commission in Docket No. AR 61-2

(2) This includes 1960 gas sales made under rate schedule 5 which is the subject of Docket

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CAROLINE HUNT SANDS

Hearing Exhibit No. X-29 (1112)

SUMMARY OF 1960 COST OF GAS SERVICE

	Entity-Wide Using Relative Cost and Modified BTU Allocations		South Louisiana Area Using Gross Revenue Realization and Modified BTU Allocations (Note 1)		Sales Under Rate Schedule 5 Using Gross Revenues and Modified BTU Allocations (Note 2)	
	Amount	Cents Per MCF	Amount	Cents Per MCF	Amount	Cents Per MCF
CF)	795,027	-	725,689	-	227,377	-
rates	$ 161,086	20.3 ¢	$ 151,208	20.8 ¢	$ 52,211	23.0 ¢
	$ 26,024	3.3 ¢	$ 21,879	3.0 ¢	$ 5,873	2.6 ¢
tion	61,017	7.7	42,240	5.8	35,387	15.6
	4,960	.6	4,354	.6	1,364	.6
	12,438	1.6	16,691	2.3	5,099	2.2
	3,333	.4	2,903	.4	910	.4
23%	190,482	24.0	158,460	21.8	111,393	49.0
	$ 298,254	37.6 ¢	$ 246,527	33.9 ¢	$ 160,026	70.4 ¢
	$ 99,641	12.5 ¢	$ 90,711	12.5 ¢	$ 28,422	12.5 ¢
t property	10,562	1.3	9,434	1.3	2,956	1.3
	$ 110,203	13.8 ¢	$ 100,145	13.8 ¢	$ 31,378	13.8 ¢
	$ 408,457	51.4 ¢	$ 346,672	47.7 ¢	$ 191,404	84.2 ¢
	$(247,371)	(31.1)¢	$(195,464)	(26.9)¢	$(139,193)	(61.2)¢

of Caroline Hunt Sands' 1960 gas sales in the South Louisiana Area as defined by the ommission in Docket No. AR 61-2
0 gas sales made under rate schedule 5 which is the subject of Docket No. G-17398.

FEDERAL POWER COMMISSION
Docket No. G-13183, et al.
Hearing Ex. No. X-29
Date Identified 6/19/62
Date Admitted EXCLUDED 6/19/62
OFFER OF PROOF

1181

Hearing Exhibit No. X-40 (excerpts)

Q. Will you give the reporter your name and address? A. J. Rhoads Foster. My business address is 1523 L Street, N.W., Washington, D. C.

Q. What is your profession? A. I am an economist and am with Foster Associates, Inc., a consulting firm.

• • • • • • • • • • •

1192

Q. Will you now explain Schedule 6 of the exhibit? A. This schedule is a summary in two parts of the tax reimbursement provisions of long-term South Louisiana sales contracts.

• • • • • • • • • • •

This information is set out separately for contracts subject to review in this consolidated proceeding, for other contracts dated in 1957 and 1958 and for contracts dated in 1960.

This information is set out separately for contracts subject to review in this consolidated proceeding, for other contracts dated in 1957 and 1958 and for contracts dated in 1960.

The other part of the schedule shows, separately for each of the three categories of contracts, the weighted average tax reimbursement, together with the respective annual delivery volumes and number of contracts, in relation to the initial base prices. Thus, for contracts dated 1957 and 1958, other than the subject contracts, reimbursement of the 2.3 cents severance tax averages 1.7 cents per Mcf for sales at initial base prices of 18.5 cents or lower, 1.8 cents for sales at initial base prices in the range

of 18.6 to 21.4 cents per Mcf and 2.0 cents for sales at initial base prices of 21.5 cents or higher.

• • • • • • • • • • •

1193

Q. Will you now described Schedule 7 and state its purpose? A. Counsel have requested that the weighted average price and range of initial base prices for contracts dated in 1957 and 1958 be shown for the following six additional categories of long-term sales to pipeline companies under contracts filed with the Federal Power Commission:

(1) The 71 sales which are the subject of this proceeding;

(2) The 30 sales dated in 1957 and 1958 which were not permanently certificated as of March 1962;

(3) The 15 contracts dated in 1957 and 1958 which superseded earlier contracts and under which prices were suspended by the Commission;

(4) All sales other than the 71 sales which are the subject of this proceeding;

(5) All sales other than the sales which are the subject of this proceeding or the 30 contracts dated in 1957 and 1958 and other sales not permanently certificated; and

(6) All permanently certificated sales under new contracts.

Q. What was the range of prices in 1957 and 1958 for sales which have been certificated and where the price is not subject to question in regulatory proceedings? A. The proportion obtained at 18.5 cents or less was only about 25 per cent of total new supply, and 25 per cent of the

total was obtained at prices of at least 21.3 cents in 1957 and 22.0 cents in 1958.

• • • • • • • • • • •

1194

A. Chart 5 shows the decline in new supplies relative to demand for natural gas, as measured by the ratio of gross reserve additions to net production in the United States. On an annual basis that ratio has declined from 2.28 in 1956, 1.75 in 1957 and 1.65 in 1958 to 1.07 in 1960 and 1.28 in 1961. The trended ratio, represented by the trend line on Chart 5, declined from 1.71 in 1956 to 1.47 in 1961. The trended ratio is the most useful indicator because it irons out rather erratic fluctuations in the annual data.

• • • • • • • • • • •

The projection of utility sales to 1970 by the American Gas Association is equivalent to an average annual growth of about 4.7 per cent in national demand for natural gas.

• • • • • • • • • • •

1198

A. Yes. Chart 12 shows the trend from 1947-1949 to 1960 in cost per Mcf of new gas supplies as determined by relating the trend in drilling cost per foot to the trend in new supplies found per foot drilled. The increase in cost per Mcf was 102 per cent in Louisiana. • • • 88 per cent for the United States.

• • • • • • • • • • •

1199

Q. What is the purpose of Chart 14? A. The purpose of Chart 14 is to relate trend in exploratory drilling activity to trend in new contract prices in South Louisiana,

so as to indicate the effect of gas prices on exploratory activity and on new gas supply.

• • • • • • • • • • •

1200

Q. What is the meaning of Chart 14? A. Exploratory and other drilling activity in South Louisiana responded to the higher level of gas prices, so that in 1957 the number of exploratory gas and condensate producers was 87 per cent more than the average for 1953-1955. However, exploratory drilling thereafter declined sharply so that by 1961 the number of new gas and condensate producers had declined to one-half the 1957 level. The responsiveness of new field producers to the change in the prospects of profitable investment was much the same as with respect to total exploratory tests. It is evident that after 1956-1957 exploratory activity was adversely influenced by the increase in drilling costs and the uncertainties regarding prices which producers might be allowed to receive for gas deliveries.

• • • • • • • • • • •

1204

Q. Have gas prices in South Louisiana vaulted from one plateau to another and for this reason alone are they inconsistent with the public interest? A. Since the words used are undefined, it is best that one look to the facts.

In the first place, the choice of words appears to overstate the increase in new contract prices in South Louisiana. Looking to

1205

the period of seven years, 1953 to 1960, the increase in the highest prices per Mcf was 12.5 per cent and the increase in the weighted average of all prices was about 22 per cent.

• • • • • • • • • • •

During that period of seven years, when the average price of gas in South Louisiana increased by 22 per cent, drilling costs per Mcf of new supplies increased by at least 52 per cent.

• • • • • • • • • • •

1206

Supply and demand for gas are responsive to changes in gas prices.

• • • • • • • • • • •

On the supply side, when demand tends to outrun supply, increased prices for gas tend to stimulate the search for and development of additional supplies. Higher prices brought about by the operation of market forces, or fixed or approved by regulatory authority, provide the incentive for producers to search for gas in relatively less promising or more costly areas and to develop reservoirs that are small, located less favorably or producible at higher costs per unit of prospective output.

• • • • • • • • • • •

1280

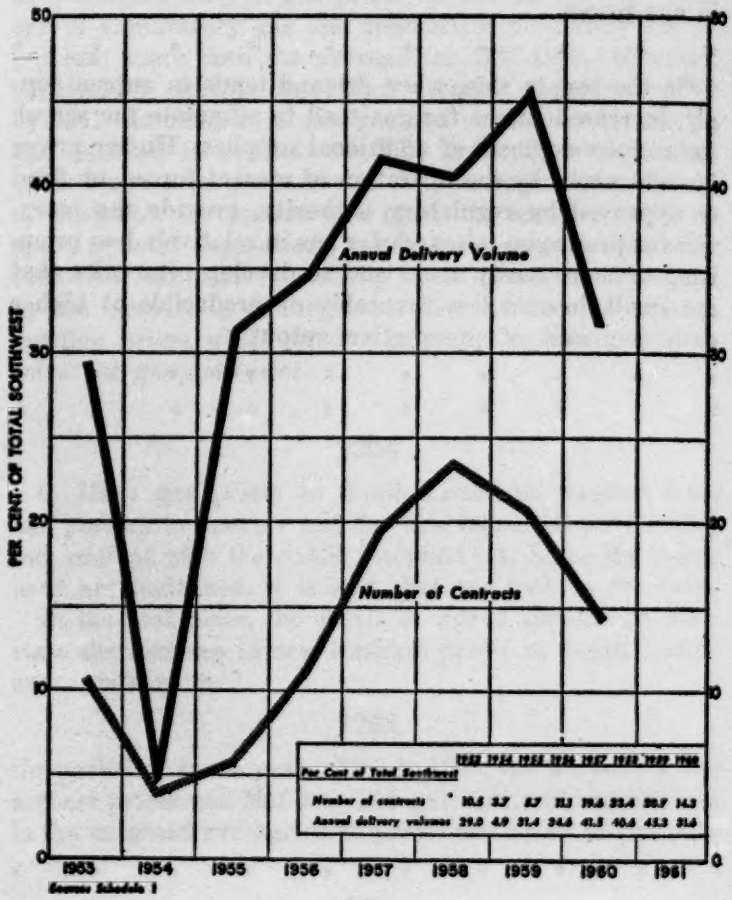
Hearing Exhibit No. X-42

CHART I

RATIO OF SOUTH LOUISIANA TO TOTAL SOUTHWEST SUPPLIES (PER CENT)

With Supplies Measured by Number of Contracts and Related Annual Delivery Volumes

1953-1960



Source: Schedule 1

9A 4599

Page 1

Schedule 1

GAS SALES TO PIPELINE COMPANIES IN SOUTH LOUISIANA SECTOR AND IN THE SOUTHWEST MARKET

Number of Contracts and Annual Delivery Volumes

1952-1960

Date of Contract (a)	Filed as Rate Schedules		Filed in Certificate Applications		Total	
	South Louisiana (b)	Southwest (c)	South Louisiana (d)	Southwest (e)	South Louisiana (f)	Southwest (g)
I. Number of Sales Contracts						
1952	25	329			25	329
1953	43	410			43	410
1954	15	403			15	403
1955	24	419			24	419
1956	69	621			69	621
1957	116	593			116	593
1958	139	595			139	595
1959	120	565	2	24	122	589
1960	103	666	5	89	108	755
II. Annual Delivery Volumes (Billions of Cubic Feet at 15.025 psia)						
1952	152.2	n.a.			152.2	n.a.
1953	122.4	421.8			122.4	421.8
1954	20.6	421.4			20.6	421.4
1955	140.5	448.1			140.5	448.1
1956	180.8	523.1			180.8	523.1
1957	207.0	498.1			207.0	498.1
1958	261.1	642.5			261.1	642.5
1959	241.5	529.7	2.3	8.3	243.8	538.0
1960	162.8	420.1	24.5	172.1	187.3	592.2

The Southwest market includes the states of Arkansas, Kansas, Louisiana, Mississippi, New Mexico, Oklahoma and Texas. The Four Corners area is not included.

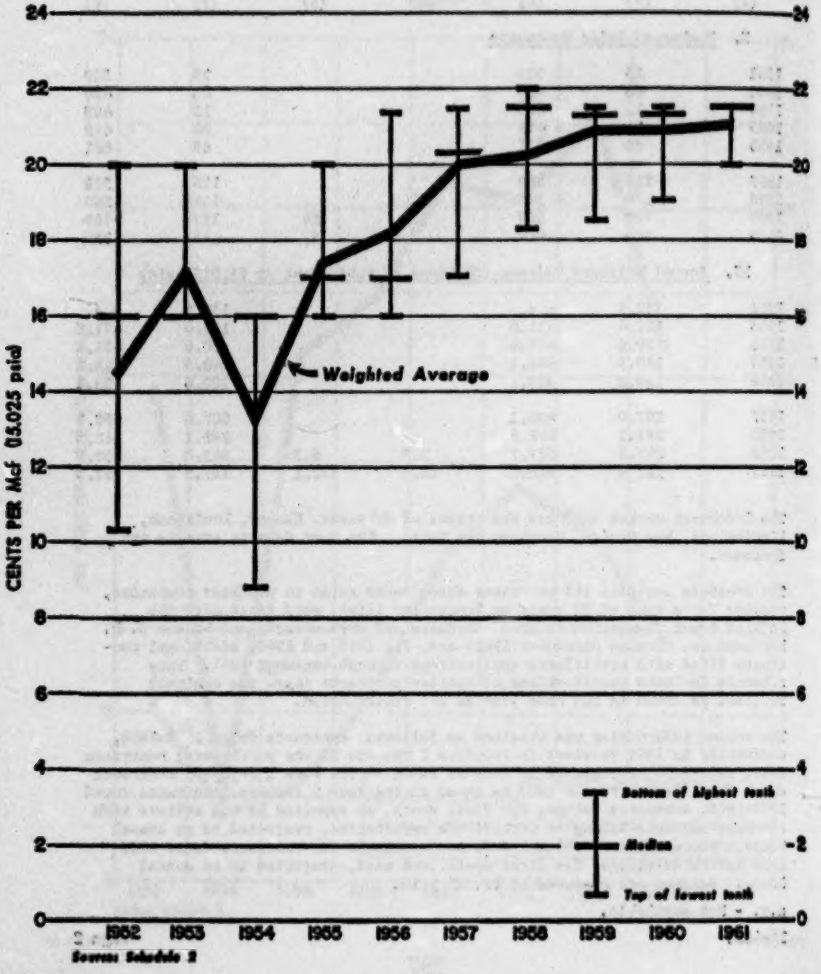
The schedule includes all contracts which cover sales to pipeline companies, provide for a term of 20 years or longer (or life), were filed with the Federal Power Commission as rate schedules and were microfilmed by the C. D. Lockwood Co. through September 1961; and, for 1959 and 1960, additional contracts filed with certificate applications through December 1961. This schedule includes ratifications of earlier contracts where the contract ratified is dated in the same year as the ratification.

The volume information was obtained as follows: contracts dated 1952-1954, deliveries in 1956 as shown in the Form 2 reports of the purchasers; contracts dated 1955-1957, deliveries in 1959 as shown in the Form 2 reports; contracts dated 1958, deliveries in 1960 as shown in the Form 2 reports; contracts dated 1959-1960, estimated volumes for first month, as reported by the sellers with the rate schedule filing or certificate application, projected to an annual basis. Where reported volumes were not available for contracts dated 1953-1958 estimated volumes for first month were used, projected to an annual basis. Volumes are measured at 15.025 psia.

n.a. - Not available.

TREND IN THE GENERAL LEVEL AND PATTERN OF INITIAL BASE PRICES IN THE SOUTH LOUISIANA SECTOR OF THE MARKET

1952 - 1961



Source: Schedule 2

FA 403

Page

Schedule 2

RANGE OF INITIAL BASE PRICES UNDER LONG-TERM GAS SALES CONTRACTS IN SOUTH LOUISIANA

Price Range Based on Annual Delivery Volumes

1952-1961

(Cents per Mcf at 15.025 psia)

Year (a)	Lowest Price (b)	Low 10% (c)	Low 25% (d)	Median (e)	High 25% (f)	High 10% (g)	Highest Price (h)	Weighted Average Price (i)
1952	7.7	10.3	11.5	16.0	16.0	20.0	20.0	14.4
1953	8.3	16.0	16.0	16.0	20.0	20.0	20.0	17.1
1954	6.3	8.8	8.8	16.0	16.0	16.0	16.0	13.3
1955	8.6	16.0	16.0	17.0	18.5	20.0	20.0	17.4
1956	9.2	16.0	16.4	17.0	20.0	21.4	21.4	18.2
1957	14.4	17.0	18.5	20.3	21.5	21.5	22.0	20.0
1958	14.0	18.3	18.5	21.5	21.5	22.0	22.0	20.5
1959	12.0	18.5	20.5	21.3	21.5	21.5	22.5	20.9
1960	14.5	19.0	20.7	21.3	21.5	21.5	22.0	20.9
1961	12.5	20.0	21.3	21.5	21.5	21.5	21.5	21.1

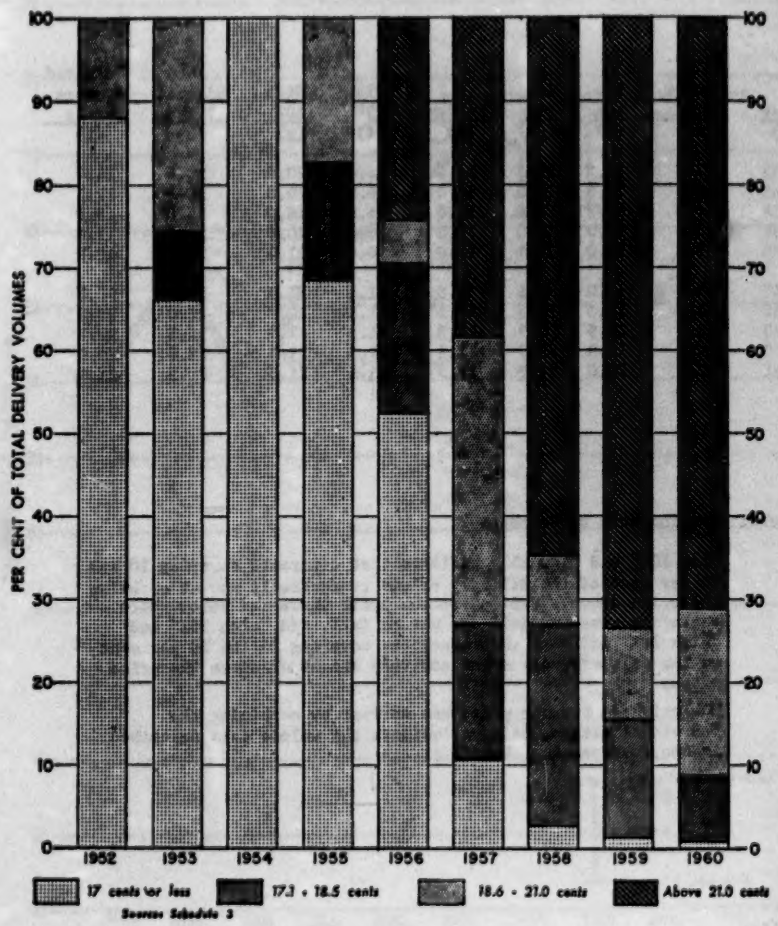
Source: See footnote to Schedule 1.

"Low 10%" and "Low 25%" indicate that contracts covering 10 and 25 per cent of the delivery volume respectively are at or below the price shown, "Median" is the price above and below which contracts covering half the volume fall, and "High 25%" and "High 10%" indicate that contracts covering 25 and 10 per cent of the delivery volume respectively are at or above the price shown.

The weighted average price was derived by combining the individual prices, using as weights the volume data described in the footnote to Schedule 1.

THE CHANGE IN RELATIVE QUANTITIES OF SOUTH LOUISIANA GAS OBTAINED BY PIPELINES AT VARIOUS INITIAL BASE PRICES

1952 - 1960



Source: Schedule 3

FA 4000

ANNUAL VOLUMES OBTAINED BY PIPELINE COMPANIES
AT DIFFERENT INITIAL BASE PRICES

SOUTH LOUISIANA

1952-1960

Initial Base Price (Cents per Mcf at 15.025 psia) (a)	1952 (b)	1953 (c)	1954 (d)	1955 (e)	1956 (f)	1957 (g)	1958 (h)	1959 (i)	1960 (j)
I. Annual Delivery Volumes (Billions of Cubic Feet at 15.025 psia)									
Below 16.0 cents	61.5	2.0	7.7	1.5	0.7	1.1	0.3	1.1	0.4
16.0	72.5	68.2	12.9	34.1	30.5	6.9	0.4	--	--
16.1 to 16.9	--	10.7	--	--	20.5	6.0	2.2	0.7	0.2
17.0	--	--	--	60.8	42.7	8.1	4.1	1.5	1.1
17.1 to 18.4	--	10.1	--	--	24.6	2.7	24.0	6.6	7.5
18.5	--	--	--	19.7	8.3	31.7	39.5	27.5	7.9
18.6 to 19.9	--	--	--	--	--	3.[illegible]	5.8	2.6	2.7
20.0	18.2	31.4	--	24.4	9.3	22.[illegible]	5.0	15.7	25.3
20.1 to 20.9	--	--	--	--	0.2	42.1	7.2	7.9	7.6
21.0	--	--	--	--	--	2.6	3.5	0.8	1.3
21.1 to 21.4	--	--	--	--	44.0	22.4	26.9	70.9	53.4
21.5	--	--	--	--	--	44.5	112.8	89.5	78.4
Above 21.5	--	--	--	--	--	12.6	29.4	33.4	1.5
Total	152.2	122.4	20.6	140.5	180.8	207.0	261.1	258.2	187.3
II. Percentage Distribution of Annual Delivery Volumes by Initial Base Price									
Below 16.0 cents	40.4	1.6	37.4	1.0	0.4	0.5	0.1	0.5	0.2
16.0	47.6	55.7	62.6	24.3	16.9	3.3	0.2	--	--
16.1 to 16.9	--	8.7	--	--	11.4	2.9	0.8	0.3	0.1
17.0	--	--	--	43.3	23.6	3.9	1.6	0.6	0.6
17.1 to 18.4	--	8.3	--	--	13.6	1.3	9.2	2.7	4.0
18.5	--	--	--	14.0	4.6	15.3	15.1	11.3	4.2
18.6 to 19.9	--	--	--	--	--	1.8	2.2	1.1	1.4
20.0	12.0	25.7	--	17.4	5.1	10.9	1.9	6.4	13.5
20.1 to 20.9	--	--	--	--	0.1	20.4	2.8	3.2	4.1
21.0	--	--	--	--	--	1.3	1.3	0.3	0.7
21.1 to 21.4	--	--	--	--	24.3	10.8	10.3	29.1	28.5
21.5	--	--	--	--	--	21.5	43.2	36.7	41.9
Above 21.5	--	--	--	--	--	6.1	11.3	7.8	0.8
Total	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0
III. Cumulative Percentage Distribution of Annual Delivery Volumes by Initial Base Price									
16.0 cents or less	88.0	57.3	100.0	25.3	17.3	3.8	0.3	0.5	0.2
17.0	--	66.0		68.6	52.3	10.6	2.7	1.4	0.9
18.5	--	74.3		82.6	70.5	27.2	27.0	15.4	9.1
20.0	100.0	100.0		100.0	75.6	39.9	31.1	22.9	24.0
21.0					75.7	61.6	35.2	26.4	28.8
21.5					100.0	93.9	88.7	92.2	99.2
Above 21.5						100.0	100.0	100.0	100.0

Source: See footnote to Schedule 1.

Initial Base Price (Cents per Mcf at 15.025 psia) (a)	1952 (b)	1953 (c)	1954 (d)	1955 (e)	1956 (f)	1957 (g)	1958 (h)	1959 (i)	1960 (j)
I. Annual Delivery Volumes (Billions of Cubic Feet at 15.025 psia)									
Below 16.0 cents	61.5	2.0	7.7	1.5	0.7	1.1	0.3	1.1	0.4
16.0	72.5	68.2	12.9	34.1	30.5	6.9	0.4	--	--
16.1 to 16.9	--	10.7	--	--	20.5	6.0	2.2	0.7	0.2
17.0	--	--	--	60.8	42.7	8.1	4.1	1.5	1.1
17.1 to 18.4	--	10.1	--	--	24.6	2.7	24.0	6.6	7.5
18.5	--	--	--	19.7	8.3	31.7	39.5	27.5	7.9
18.6 to 19.9	--	--	--	--	--	3.8	5.8	2.6	2.7
20.0	18.2	31.4	--	24.4	9.3	22.5	5.0	15.7	25.3
20.1 to 20.9	--	--	--	--	0.2	42.1	7.2	7.9	7.6
21.0	--	--	--	--	--	2.6	3.5	0.8	1.3
21.1 to 21.4	--	--	--	--	44.0	22.4	26.9	70.9	53.4
21.5	--	--	--	--	--	44.5	112.8	89.5	78.4
Above 21.5	--	--	--	--	--	12.6	29.4	33.4	1.5
Total	152.2	122.4	20.6	140.5	180.8	207.0	261.1	258.2	187.3
II. Percentage Distribution of Annual Delivery Volumes by Initial Base Price									
Below 16.0 cents	40.4	1.6	37.4	1.0	0.4	0.5	0.1	0.5	0.2
16.0	47.6	55.7	62.6	24.3	16.9	3.3	0.2	--	--
16.1 to 16.9	--	8.7	--	--	11.4	2.9	0.8	0.3	0.1
17.0	--	--	--	43.3	23.6	3.9	1.6	0.6	0.6
17.1 to 18.4	--	8.3	--	--	13.6	1.3	9.2	2.7	4.0
18.5	--	--	--	14.0	4.6	15.3	15.1	11.3	4.2
18.6 to 19.9	--	--	--	--	--	1.8	2.2	1.1	1.4
20.0	12.0	25.7	--	17.4	5.1	10.9	1.9	6.4	13.5
20.1 to 20.9	--	--	--	--	0.1	20.4	2.8	3.2	4.1
21.0	--	--	--	--	--	1.3	1.3	0.3	0.7
21.1 to 21.4	--	--	--	--	24.3	10.8	10.3	29.1	28.5
21.5	--	--	--	--	--	21.5	43.2	36.7	41.9
Above 21.5	--	--	--	--	--	6.1	11.3	7.8	0.8
Total	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0
III. Cumulative Percentage Distribution of Annual Delivery Volumes by Initial Base Price									
16.0 cents or less	88.0	57.3	100.0	25.3	17.3	3.8	0.3	0.5	0.2
17.0	--	66.0		68.6	52.3	10.6	2.7	1.4	0.9
18.5	--	74.3		82.6	70.5	27.2	27.0	15.4	9.1
20.0	100.0	100.0		100.0	75.6	39.9	31.1	22.9	24.0
21.0					75.7	61.6	35.2	26.4	28.8
21.5					100.0	93.9	88.7	92.2	99.2
Above 21.5						100.0	100.0	100.0	100.0

Source: See footnote to Schedule 1.

Detail may not add to totals because of rounding.

Schedule 4

NUMBER OF CONTRACTS FOR SALE OF NATURAL GAS TO PIPELINE COMPANIES AT DIFFERENT INITIAL BASE PRICES

SOUTH LOUISIANA

1932-1960

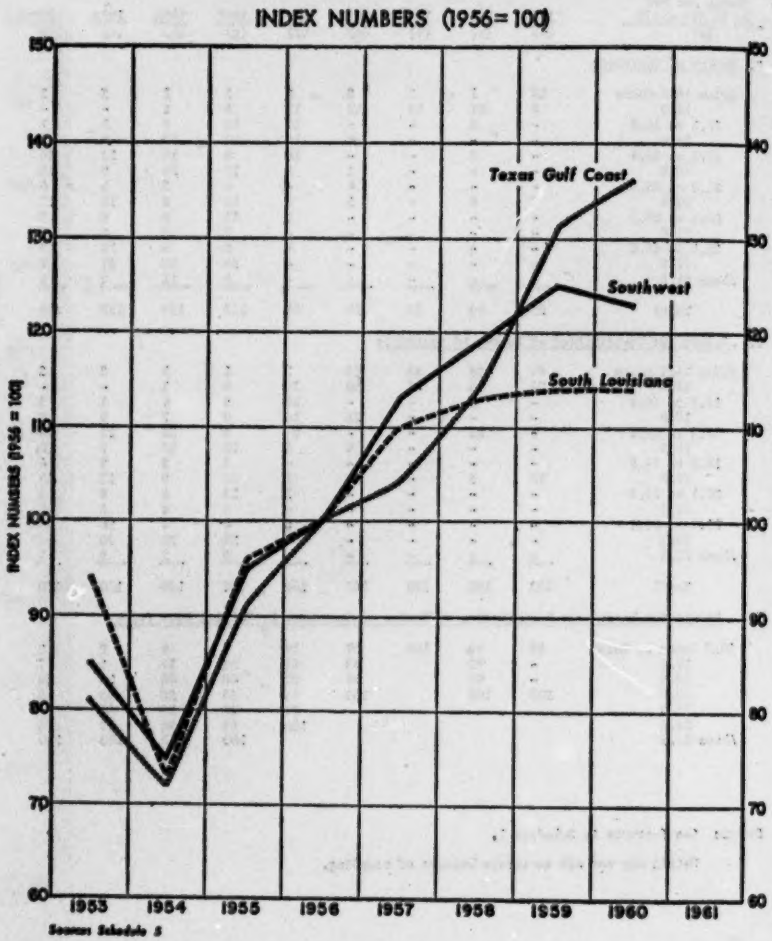
Initial Base Prices (Cents per Mcf at 15.025 psia) (a)	1932 (b)	1933 (c)	1934 (d)	1935 (e)	1936 (f)	1937 (g)	1938 (h)	1939 (i)	1940 (j)
I. Number of Contracts									
Below 16.0 Cents	16	7	3	3	2	1	1	3	2
16.0	6	21	10	12	11	5	2	-	-
16.1 to 16.9	-	2	-	-	11	10	6	1	1
17.0	-	-	-	3	18	10	10	6	5
17.1 to 18.4	-	9	-	-	16	4	14	13	16
18.5	-	-	-	1	2	17	26	9	11
18.6 to 19.9	-	-	-	-	-	4	3	3	4
20.0	3	4	-	3	4	11	8	14	13
20.1 to 20.9	-	-	-	-	1	13	5	6	2
21.0	-	-	-	-	-	1	5	2	2
21.1 to 21.4	-	-	-	-	4	5	5	25	20
21.5	-	-	-	-	-	29	43	37	31
Above 21.5	-	-	-	-	-	4	11	3	1
Total	25	43	15	24	69	116	139	122	108
II. Percentage Distribution of Number of Contracts									
Below 16.0 Cents	64	16	33	13	3	1	1	3	2
16.0	24	49	67	50	16	4	1	-	-
16.1 to 16.9	-	5	-	-	16	9	4	1	1
17.0	-	-	-	21	26	9	7	5	5
17.1 to 18.4	-	21	-	-	23	3	10	11	15
18.5	-	-	-	4	3	15	19	7	10
18.6 to 19.9	-	-	-	-	-	3	2	2	4
20.0	12	9	-	12	6	10	6	11	12
20.1 to 20.9	-	-	-	-	2	13	4	5	2
21.0	-	-	-	-	-	1	4	2	2
21.1 to 21.4	-	-	-	-	6	4	4	20	18
21.5	-	-	-	-	-	25	31	30	29
Above 21.5	-	-	-	-	-	3	6	3	1
Total	100	100	100	100	100	100	100	100	100
III. Cumulative Percentage Distribution of Number of Contracts by Initial Base Price									
16.0 Cents or Less	88	65	100	62	19	5	2	2	2
17.0	-	70		83	61	22	14	8	7
18.5	-	91		88	87	40	42	25	32
20.0	100	100		100	93	53	50	40	48
21.0					94	67	58	47	52
21.5					100	97	92	97	99
Above 21.5						100	100	100	100

Source: See footnote to Schedule 1.

Detail may not add to totals because of rounding.

CHART

COMPARATIVE TRENDS IN WEIGHTED AVERAGE INITIAL BASE PRICES IN SOUTH LOUISIANA, TEXAS GULF COAST AND THE TOTAL SOUTHWEST MARKET



Sources: Schedule 5

FA 4789

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Schedule 5

TREND IN WEIGHTED AVERAGE INITIAL BASE PRICES
UNDER LONG-TERM GAS SALES CONTRACTS

1953-1960

Year (a)	South Louisiana (b)	Texas Gulf Coast (c)	Total Southwest Market (d)
I.	Cents per Mcf (15.025 psia)		
1953	17.1	11.1	12.8
1954	13.3	9.9	11.3
1955	17.4	12.4	14.3
1956	18.2	13.7	15.0
1957	20.0	14.2	17.0
1958	20.3	16.2	17.9
1959	20.9	18.0	18.7
1960	20.9	18.7	18.6
II.	Index Numbers (1956=100)		
1953	94	81	85
1954	73	72	75
1955	96	91	95
1956	100	100	100
1957	110	104	113
1958	113	114	119
1959	115	131	125
1960	115	136	124

Source: See footnote to Schedule 1. The weighted average prices were obtained by use of the volume data described in the footnote to Schedule 1.

REIMBURSEMENT OF TAXES BASED ON TAXES EFFECTIVE ON AND AFTER DECEMBER 1, 1958

LONG-TERM CONTRACTS DATED 1957, 1958 AND 1960

SOUTH LOUISIANA

(Prices and Volumes Stated at 15.025 psia)

I. Distribution of Number of Contracts and Annual Delivery Volumes by Amount of Tax Reimbursement

	Sales Subject to Inquiry in the Consolidated Proceedings			Other Contracts Dated 1957 and 1958			Contracts Dated 1960		
	Tax Reimbursement (Cents per Mcf) (a)	Number of Contracts (b)	Annual Delivery Volumes (MMcf) (c)	Tax Reimbursement (Cents per Mcf) (d)	Number of Contracts (e)	Annual Delivery Volumes (MMcf) (f)	Tax Reimbursement (Cents per Mcf) (g)	Number of Contracts (h)	Annual Delivery Volumes (MMcf) (i)
	--	--	--	None	1	221	--	--	--
	0.75	1	6,784	--	--	--	1.15	5	2,568
	--	--	--	1.30	1	587	--	--	--
	--	--	--	1.50	43	40,039	1.50	30	52,664
	--	--	--	1.75	82	155,167	1.75	23	31,384
	1.80	7	13,482	1.80	1	636	--	--	--
	--	--	--	1.875	6	2,885	1.875	4	2,678
	2.05	43	68,407	2.05	32	57,562	2.05	23	19,247
	--	--	--	2.175	8	21,497	2.175	5	6,841
	2.30	3	42,294	2.30	1	4,815	2.30	10	32,206
Total		54	130,967		175	283,409		100	147,588
Average:									
Arithmetic	2.01			1.76			1.80		
Weighted	2.04			1.82			1.83		

II. Amount of Tax Reimbursement Related to Initial Base Prices

	Sales Subject to Inquiry in the Consolidated Proceedings			Other Contracts Dated 1957 and 1958			Contracts Dated in 1960		
Initial Base Price Intervals	Number of Contracts (a)	Annual Delivery Volumes (MMcf) (b)	Weighted Average Tax Reimbursement (Cents per Mcf) (c)	Number of Contracts (d)	Annual Delivery Volumes (MMcf) (e)	Weighted Average Tax Reimbursement (Cents per Mcf) (f)	Number of Contracts (g)	Annual Delivery Volumes (MMcf) (h)	Weighted Average Tax Reimbursement (Cents per Mcf) (i)
18.5¢ and under	--	--	--	99	123,307	1.69	35	17,142	1.73
18.6¢ to 21.4¢	6	12,277	1.33	50	99,259	1.85	35	79,493	1.76
21.5¢ and over	48	118,690	2.11	26	60,843	2.01	30	50,953	1.97
Total	54	130,967	2.04	175	283,409	1.82	100	147,588	1.83

Tax reimbursement is shown by this schedule in accordance with the provisions of the contracts as they are reflected in the initial and supplemental filings of the sample billing statement by the seller on the basis of the 2.3 cents per Mcf severance tax effective December 1, 1958. Contracts with respect to which no such filings have been made and which are thus excluded from the computations are the instances where a billing statement showing tax reimbursement on the basis of the 2.3 cents severance tax has not been filed for any reason, including the instances where the production is offshore and outside the jurisdiction of Louisiana as well as instances where the contracts have not as yet been filed as rate schedules. In nearly all instances the contracts include provision for reimbursement of taxes. The numbers of contracts thus not included in the computations are 17 among the 71 contracts involved in the consolidated proceedings, 14 among the 189 other long-term contracts dated in 1957 and 1958 and 8 among the 108 contracts dated in 1960. In several instances among the contracts included in the computations the tax reimbursements filed have been suspended by the Commission due to a question of interpretation of the contractual provisions related to the severance taxes -- 2 among the contracts subject to inquiry in the consolidated proceedings, 12 among the other contracts dated in 1957 and 1958 and none among the contracts dated in 1960.

DISTRIBUTIONS OF INITIAL BASE PRICES UNDER LONG-TERM SOUTH LOUISIANA CONTRACTS DATED 1957 AND 1958

(Cents per Mcf at 15.025 psia)

	Range of Prices Based on Volume							Weighted Average Price	Annual Volume (Bill. Cu. Ft.)	Number of Contracts
	Lowest Price (a)	Low 10% (b)	Low 25% (c)	Median (d)	High 25% (e)	High 10% (f)	Highest Price (g)	(h)	(i)	(j)
1. All Sales										
1957	14.4	17.0	18.5	20.3	21.5	21.5	22.0	20.0	207.0	116
1958	14.0	18.3	18.5	21.5	21.5	22.0	22.0	20.5	261.1	139
2. The Sales Which Are the Subject of This Proceeding a/										
1957	21.0	21.4	21.4	21.5	22.0	22.0	22.0	21.6	46.1	25
1958	21.0	21.4	21.5	21.5	21.5	21.5	22.0	21.5	110.1	41
3. Other Sales Not Permanently Certificated as of Mar. 31, 1962										
1957	17.0	18.5	18.5	20.5	20.6	21.5	21.5	19.8	4.5	6
1958	17.0	18.5	20.0	21.4	21.5	21.5	21.5	20.6	37.2	24
4. Superseding Contracts Under Which Prices Were Suspended										
1957	17.0	18.5	18.5	18.5	18.5	18.5	18.5	18.4	16.8	7
1958	18.2	18.5	18.5	18.5	18.5	20.5	20.5	18.8	33.6	8
5. All Sales Other Than Sales Which Are the Subject of This Proceeding [Sales in line (1) less sales in line (2)]										
1957	14.4	17.0	18.5	20.0	20.5	21.5	21.5	19.6	160.8	91
1958	14.0	17.6	18.5	19.0	21.5	22.0	22.0	19.8	151.0	98
6. All Sales Other Than the Subject Sales and Other Sales Not Permanently Certificated [Sales in line (1) less sales in lines (2) and (3)]										
1957	14.4	17.0	18.5	20.0	20.5	21.5	21.5	19.6	156.3	85
1958	14.0	17.6	18.5	18.5	21.5	22.0	22.0	19.5	113.8	74
7. All Permanently Certificated Sales Under New Contracts [Sales in line (1) less sales in lines (2), (3) and (4)]										
1957	14.4	16.8	18.5	20.3	21.3	21.5	21.5	19.7	139.5	78
1958	14.0	17.6	18.3	19.0	22.0	22.0	22.0	19.8	80.2	66

Source: See footnote to Schedule 1.

a/ The information shown covers those sales included in Line (1). There are 74 dockets consolidated in this proceeding. The 74 dockets represent 71 separate contracts for the reason that there are some sales by two or more parties under a given contract. Line (1) includes information for 66 of these 71 contracts; 5 contracts, all dated 1958, are not included for the reason that they had not been filed as rate schedules through the cut-off date used in preparing the data for all sales. (See footnote to Schedule 1). Estimated delivery volumes are available for 3 of these 5 contracts and, in the aggregate, amount to 2.4 billion cubic feet annually. If the price distributions shown in Line (2) are recomputed to include these 3 sales, the range of prices and the weighted average price are unchanged.

The 5 sales not included in Lines (1) and (2) are identified below:

Docket Number	Buyer and Seller	Date of Contract	Initial Base Price (15.025 psia)	Annual Volume (Bill. Cu. Ft.)
G-14355	Transcontinental Gas Pipeline Co. Cities Service Production Co.	1/2/58	21.5	NR
G-17417	Transcontinental Gas Pipeline Co. Pan American Petroleum Corp.	11/14/58	22.0	1.1
G-17341	Hope Natural Gas Co. Callery Properties Inc., et al.	12/16/58	21.5	NR
G-17402	Hope Natural Gas Co. Beck Oil Co., et al.	11/26/58	21.5	0.3
G-17413	Hope Natural Gas Co. Mississippi River Fuel Corp.	10/27/58	21.5	1.0

NR - not reported.

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New Contract Prices (pages 1-11)

The price information is for two categories of contracts combined. The first consists of the gas sales contracts filed with the Commission as rate schedules. The information with respect to this category of contracts is made available by continuation of the briefing program pursued since 1956 by Foster Associates. The second category consists of sales contracts which have been filed as exhibits in certificate applications made by pipeline companies and by independent producers but which had not been filed as rate schedules in time to be included in that category.

The initial base price is the price at which, subject to adjustment, the seller agrees to make delivery and the buyer agrees to take supplies during the first pricing period of the contract. The initial base price is typically the lowest price provided by the contract. The price effective during the initial period may vary from the initial base price (1) because of operation of a tax reimbursement clause, (2) because of adjustments for variations from standard quality specifications, such as an adjustment for Btu content, or, (3) because of the operation of a flexible price adjustment clause.

Actual or estimated deliveries are used as the measure of quantity sold under each contract for the reason that information as to estimated reserves committed under the various contracts is not readily obtainable. At the time of negotiating the sale there is often considerable uncertainty as to quantity of gas involved. In any case, it appears that estimated first month's deliveries or actual deliveries over a period of a year are generally acceptable measure of relative quantity sold under the contracts.

• • • • • • • • • •

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Hearing Exhibit No. X-43

Q. Please state your name and address. A. My name is J. Philip Sherwood. I reside in Tulsa, Oklahoma, and my office address is National Bank of Tulsa Building, Tulsa, Oklahoma.

Q. By whom are you employed? A. I am employed as an accounting manager by Arthur Young & Company, one of the large national firms of certified public accountants.

Q. Please summarize briefly your educational and business experience. A. In 1942 I graduated from the University of Kansas with a degree of Bachelor of Science in Business Administration. My majors were accounting and economics.

For the next eight years, I was employed by Arthur Andersen & Co., another of the large national firms of certified public accounts. During this period my work was virtually 100% with clients of the firm in the natural gas pipeline and public utility industries. My work consisted of annual audits and the preparation of financial statements for inclusion in annual reports to stockholders, audits in connection with the registration statements and preparation of financial statements and schedules included therein, special studies in connection with utility property purchases, sales and closings, rate case preparation, and original cost and unit property record installations.

Some of the accounts for which I was responsible as the senior accountant in charge of engagements were Panhandle Eastern Pipe Line Company, Texas Gas Transmission Corporation, Kansas City

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Power and Light Company, Louisville Gas and Electric Company, Southern Indiana Gas and Electric Company,

Western Kentucky Gas Company, Missouri Public Service Company, and St. Joseph Light and Power Company.

In September of 1950 I accepted a position as Secretary and Treasurer of Michigan Gas and Electric Company, a combination utility serving extensive geographic areas in Michigan. In such capacity I was responsible for all of the accounting, financial, and corporate regulatory matters of that Company before the Michigan Public Service Commission and the Federal Power Commission. Early in 1955 I was transferred from the General Offices of the Michigan Gas and Electric Company located in Three Rivers, Michigan, to the office of the Company's Board Chairman in New York and Stamford, Connecticut. For approximately a year and a half thereafter I also was employed simultaneously as Assistant to the President of Citizens Utilities Company and New York Water Service Corporation, the same individual being the chief executive officer of each of the three companies.

In June of 1956 I resigned these positions to become Assistant to the Senior Vice President of Panhandle Eastern Pipe Line Company. My duties with Panhandle included economic studies, negotiation of gas sales contracts with customer companies, general customer relations, and representation of the company before various regulatory commissions to whose jurisdiction it was subject.

Since my employment with Arthur Young & Company, I have devoted my time 100% to regulatory matters of clients of the firm in cases

involving Rate and Certificate matters before the Federal Power Commission, both in the independent producer field and in the regulation of natural gas pipeline companies.

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Q. Do you have any professional degrees and society memberships? A. I am a Certified Public Accountant, a member of the American Institute of CPA's, the Oklahoma Society of CPA's, and of the American Gas Association.

Q. Have you previously testified in cases before the Federal Power Commission? A. Yes, I have testified before this Commission in numerous cases over the past seven or eight years, involving natural gas rates, certificates of public convenience and necessity, and abandonment applications.

Q. Have you also testified as an expert witness for other regulatory commissions? A. Yes, I have testified on numerous occasions before the Michigan Public Service Commission, both on behalf of Panhandle and of Michigan Gas Electric Company, and also have testified before the Illinois Commerce Commission.

Q. What were you requested to do in this case? A. I was requested by Sun Oil Company to review sales and operating statistics of certain major gas distribution companies who purchase their supplies from Transcontinental Gas Pipeline Company (Transco) or Texas Eastern Transmission Corporation (Texas Eastern), with a view toward ascertaining whether recent increases in supplies

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of pipeline gas made available by these pipelines to their customers, and which largely have been grounded upon the independent producer sales involved in these consolidated proceedings, Docket Nos. G-13169, *et al.*, actually have proved to have been in the public interest from the standpoint of the financial well being of the distribution utilities and their customers, the ultimate consumers of the gas.

Q. How did you go about making such an evaluation?
A. I concentrated my studies on the operations of the Philadelphia Gas Works, a municipally owned utility serving the gas requirements of the City of Philadelphia, and operated as a division of United Gas Improvement Company. My reasons for selecting this gas utility are several, including: (1) the fact that it is strictly a gas utility whose operations would not be influenced by the results of operations of electric, water or steam utilities and would involve no allocations of cost between dual utility services; (2) the Gas Works purchases its supplies both from Transco and from Texas Eastern; (3) the management of this utility has taken a very active role in connection with independent producer certificate and rate matters, and to my knowledge a complete disclosure of its successful operations has not heretofore been made before the Federal Power Commission.

Q. What source data did you use for your study of the operation of the Philadelphia Gas Works Division of the United Gas Improvement Company?

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A. The following: (1) Report dated November 21, 1960, covering the operation of the Philadelphia Gas Works for the years 1959 and 1960 submitted by the Controller of the City of Philadelphia to the Mayor, members of the City Council and members of the Philadelphia Gas Commission; (2) Report dated November 22, 1961, covering the operation of the Philadelphia Gas Works for the year 1961 submitted by the Controller of the City of Philadelphia to the Mayor, members of the City Council and members of the Philadelphia Gas Commission; (3) A voluminous report dated November 13, 1959, made by Commonwealth Services, Inc., and entitled "Economic Study—The Philadelphia Gas Works", which contains, along with numerous

other data, summaries of revenues, operating expenses and capital expenditures for the years 1950 through 1959; (4) A report dated October 9, 1961, to the President and members of the Council of the City of Philadelphia by a special committee of the Council appointed "to conduct an inquiry and study of the practices, payments, expenditures, budgets and operations of the Philadelphia Gas Works Division of the United Gas Improvement Company; . . ."; (5) A special report dated May 2, 1960, made by the Controller of the City of Philadelphia with regard to the Sales Department activities of the Philadelphia Gas Works; (6) A report dated August 18, 1958, made by Charles G. Simpson, Vice President and General Manager of the Philadelphia Gas Works Division of the United Gas Improvement Company to the President and members of the Council of the City of Philadelphia concerning the operation of the gas works; (7) Testimony of Mr. Simpson given in a public hearing on Bill No. 1513

held by the Committee on Public Property and Public Works of the City of Philadelphia on December 12, 1961; (8) Market data evidence presented by witnesses for the Philadelphia Gas Works in Transco Certificate Docket Nos. G-13143, G-16603 and CP62-86; (9) Data on 1961 fiscal years sales volumes furnished us directly from the office of Mr. S. Newton Croll, Manager of System Planning for the Gas Works; (10) Annual Reports to stockholders of the United Gas Improvement Company for the years 1957 through 1961, inclusive; (11) Capital budget reports dated May 29, 1961, and April 17, 1962, covering fiscal periods ending August 31, 1962 and 1963, respectively, made by the aforesaid Mr. Simpson to the Philadelphia Gas Commission.

Q. Did you prepare a one page exhibit entitled United Gas Improvement Company—Philadelphia Gas Works Division—Financial Results of Operations—1950-1961?

A. Yes, I did.

Q. Generally what results are indicated by the exhibit?

A. The exhibit shows that the Philadelphia Gas Works operation has been a highly successful financial venture and has experienced a steadily increasing trend in gas sales revenues and net operating income during this period.

Q. Do you know whether this trend was produced principally by increased supplies of gas for resale or whether increased rates have been principally responsible for the higher revenues and net operating income over this period of years?

A. The only rate increase granted during this period was a very nominal

one of 1.42% to pass on a fourteen mil gross receipts tax imposed by the State of Pennsylvania in 1959. Such increase became effective on January 1, 1960. Therefore the improvement in revenues and net operating income during this period can be attributed to the increased sales volumes, which in turn are attributable to the increased supplies of natural gas made available to the Philadelphia Gas Works by its pipeline suppliers. Indeed Mr. Simpson discussed this favorable development in his August 18, 1958 report to the City Council, referred to as the foregoing Item No. 6 wherein he said on page 4:

> "A principal element is seen in the availability of larger quantities of natural gas authorized for sale to PGW as a result of representation of our needs to the Federal Power Commission; net income has been

benefited by even greater use of gas . . . by residential, commercial and industrial customers than that indicated by market surveys; . . ."

Q. Would you briefly summarize the relationship existing among the City of Philadelphia, the Philadelphia Gas Works, and the United Gas Improvement Company?

A. United Gas Improvement Company has operated the Gas Works on behalf of the City since 1897. Originally the operation was purely on a lease basis; however, the most recent agreement between the City and UGI, embodied in Bill No. 1513, an ordinance passed by the City Council and approved by the Mayor on December 29, 1961, makes it clear that UGI is to operate the Gas Works in a "fiduciary relationship to the City."

Q. Does The United Gas Improvement Company have any funds invested in the Philadelphia Gas Works?

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A. No. At one time United Gas Improvement Company did have certain amounts of funds advanced to the Gas Works for working capital and other loans. However, these all have been repaid, and since 1954 The United Gas Improvement Company has had no investment in the Philadelphia Gas Works.

Q. On Lines 24 and 25 of Exhibit No. — you indicated that the Philadelphia Gas Works Gas Plant accounts has increased from $71,890,987 at the end of the 1949 fiscal year to $168,526,281 at the end of the 1961 fiscal year. How have such gas plant additions been financed?

A. Additions to gas plant are financed largely on a "pay-as-you-go" basis out of retained earnings. During the period in question, utility plant increased almost $97,000,000, however, loans made to the Gas Works from outside sources increased only from $15,343,905 in 1949 to

$19,419,414 at the close of the 1961 fiscal period. Thus, only $4,075,509 of new funds were required for the plant additions aggregating $97,000,000. All of such funds were furnished by the City and in addition the City has provided funds to repay The United Gas Improvement Company some $8,460,000 of loans which it had made to the Gas Works as of August 31, 1949.

Such outside funds were required because of the rapid expansion of the Gas Works properties in the immediate postwar period. The aggregate amount of advances by the City to the Gas Works reached a high of $26,814,867 at the end of August 31, 1957, fiscal period. Since that date funds provided from operations have

been sufficient to finance all new construction and to materially reduce the amount of the loan advances made by the City to the Gas Works.

Construction budgets submitted to the Philadelphia Gas Commission for the period through the 1963 fiscal year indicate that the Philadelphia Gas Works will continue on the 100% "pay-as-you-go" basis on which it has operated in recent years.

Q. On Line 13 of Exhibit No. — there is indicated for each of the years 1950 through 1961 a payment of $800,000 by the Gas Works to The United Gas Improvement Company. What does this item represent?

A. This is the fee which The United Gas Improvement Company charges to the Gas Works for the management services which it performs for the Gas Works.

Q. What services does The United Gas Improvement Company perform for the Philadelphia Gas Works?

A. Out of such fee The United Gas Improvement Company pays the salary of the full time chief executive officer

in charge of the Gas Works (Mr. Simpson) and the salaries of four other executives. The fee also is to cover the cost of the time of any of the other executive officers of the United Gas Improvement Company for its employees devoted to the Gas Works operation, including research and technical personnel. All other salaries and expenses of the Gas Works are paid directly from the Gas Works funds.

Q. In the material which you studied did you see any indication of the cost to The United Gas Improvement Company of the services which

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it performs for the Philadelphia Gas Works?

A. Yes, the report of the special committee of the council referred to as Item No. 4 in the foregoing listing, indicates that the five officers of the Gas Works who are paid by UGI receive salaries "of something more than $100,000" and that UGI spends additional amounts of "almost $64,000 for other direct, tangible expenses." The balance, of course, represents reimbursement for any general corporate overhead of UGI and profits to it.

Q. Has UGI made any other profits out of its arrangement with Philadelphia Gas Works?

A. Yes, according to the same report, UGI used the facilities of the Gas Works for research in the development of "Cyclic Catalytic Reforming Process" of manufacturing gas. While UGI apparently made reimbursement to the Gas Works for the costs incurred in connection with this research program, and permits the Gas Works to use the process without charge, UGI has retained ownership of the patent for the process and has derived a substantial income therefrom.

Q. Does the annual fee of United Gas Improvement Company remain at the $800,000 per annum under the new ordi-

nance incorporated into Bill No. 1513 effective December 29, 1961?

A. No. The United Gas Improvement Company got a 25% annual increase in the rate of compensation paid for its services, so that now the annual fee is at the rate of $1,000,000 per year.

Q. What is represented by the amount shown on Line 14 of Exhibit No. — entitled "Return Paid the City of Philadelphia?"

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A. These payments, which have been at the rate $5,200,000 since the year 1951, may be characterized as additional return above intent charged on loans made by the City to the Gas Works, plus possible charges in lieu of taxes which might be imposed by the City on the Gas Works were it a privately owned corporation.

Q. Has any increase been made in the amount of payments of earnings into the City's general funds?

A. Yes, the $5,200,000 provided in the old agreement now has been increased to $7,200,000 pursuant to the terms of the December 29, 1961 agreement. This represents an increase in revenues payable to the City of 31.5%. Additionally the City received a single payment of $6,000,000 upon execution of the new agreement.

Q. Are any other important changes embodied in the new arangement covered by Bill No. 1513?

A. Yes, a number of changes have been made increasing the power of the City Gas Commission in the management of the Gas Works property. However, the most important change, in my opinion, is placing the Gas Works operation on a basis of regular depreciation accounting.

Q. How will this work?

A. You will note on Exhibit No. — that no provisions

for depreciation have been charged against operating revenues during the period 1950 through 1961. Instead, appropriations of net income have been made to a reserve for renewals and replacement of plant in varying amounts depending upon the amount of income available therefore. Under the new plan regular annual accruals of depreciation on the

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original cost of plant will be provided as a charge against operating income. In addition thereto, it is contemplated that depreciation accruals will be made in amounts to provide for so-called "price level" depreciation.

Q. What is "price level" depreciation?

A. This is a method by which the depreciation base instead of being the original cost of utility plant is such original cost trended to current day installation or equipment cost levels.

Q. Is it correct that the new ordinance requires that such price level depreciation be accrued upon the books of the Gas Works?

A. It is required unless otherwise directed by the Gas Commission.

Q. How much is it estimated that such annual depreciation charges will be?

A. According to a testimony given by Mr. Charles G. Simpson, Vice President of UGI and General Manager of the Philadelphia Gas Works, at a hearing held on December 12, 1961, before the City Council's Committee on Public Property and Public Works, the original cost depreciation will approximate $4,000,000 per annum, and the price level depreciation an additional $4,000,000, making the total depreciation charges in the neighborhood of $8,000,000 per annum.

Q. What is the effect of the price level depreciation upon gas rates, generally speaking?

A. It is rather obvious that price level depreciation will require the collection of $4,000,000 more in revenues from present rate payers than would be required by simple original cost depreciation.

In a municipally owned corporation this becomes largely a matter of shifting a cost burden from future to present rate payers. Such policy, of course, has been pursued for some time under the "pay-as-you-go" policy adopted with respect to the financing of additions to gas plant.

Q. Referring to Line 27 on which you have set forth the rate of earnings on gross utility plant for the years 1950 through 1961, it is noted that the rate appears to be somewhat higher in the four-year period 1950 through 1953 than in the latter period including 1961. Should any significance be attached to this?

A. It must be remembered that I have shown here a rate of earnings on gross utility plant. Had adequate depreciation provisions been set up historically on this property, the net utility plant and rate base would have been considerably lower than the gross utility plant which I have used as a basis of computation, and the rate of return earned each year would have been higher because of the fact that the depreciation reserve would have been growing. The effect would have been to reduce the rate base more in the later years shown on the schedule than in the earlier years. Under these principles, which are used by virtually all rate making regulatory bodies including the Federal Power Commission, there would not have been any substantial reduction in the rate of earnings during this period.

Q. Could not a computation be made of the rate of return earned by deducting from the gross utility plant the amount

of the reserve built up for renewals and replacements of plant?

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A. Yes, it would have been possible to do this. However, it must be born in mind that the results of such a computation would have produced a rate-of-return less than that which would have been computed had the Philadelphia Gas Works been following depreciation accounting for a substantial time enough to build an adequate depreciation reserve. This conclusion is fully born out by a statement appearing in the Commonwealth Services Report dated November 13, 1959, to which I have referred earlier, as follows: "As the balance of reserve for renewal and replacement amounted to $50,332,119 at August 31, 1959, it is far short of adequacy."

Q. Bearing such qualification in mind did you make any calculation of what the rate of earnings of Philadelphia Gas Works would have been, had the balance in the reserve for renewals and replacements been deducted from the balance of gross utility plant?

A. Yes, I made such a computation for the year 1961 deducting the average of the beginning and end of year balance in reserve for renewals and replacements, in the amount of $63,202,750, from the gross original cost of $164,594,302; which would produce a net original cost rate base of $101,391,552. This would produce a rate of return of 21.65% before depreciation charges. However, if one deducts Mr. Simpson's estimate of $4,000,000 of original cost depreciation from the $21,956,640 of net operating income before depreciation, the adjusted rate of return becomes 17.71% on a net original cost rate base unadjusted for any cumulative depreciation reserve inadequacy.

Q. Had Philadelphia Gas Company rates for 1961 been set by the same regulatory standards as adopted by the Federal Power Commission in setting natural gas pipeline rates, would rates to the ultimate consumers of natural gas have been lower during the 1950-1961 period than those actually charged by the Philadelphia Gas Works?

A. Yes, had standards been followed comparable to those which have become uniform with respect to the Federal Power Commission treatment of a number of items of pipeline, cost of service, rates to the consumers could have been substantially lower during this twelve-year period.

Q. What standards did you have in mind in reference to the answer to the preceding question?

A. I had reference particularly to the following matters: (1) A net depreciated original cost rate base; (2) A rate of return ranging from 5½% to 6½%; (3) Regulatory scrutiny of such items as management service charges, merchandising charges to gas operations and other charges of possible questionable validity in cost of service.

Q. Have you made any comparison of the actual gas purchases and sales of the Philadelphia Gas Works for the period 1958 through 1961, inclusive, with the sales which were estimated to be made by the Gas Works' management in connection with their request for an additional allocation of gas from Transco at Docket Nos. G-13143, *et al*?

A. Yes, I have. Such comparison is as follows:

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	Period Ending August 31,			
	1958	1959	1960	1961
MCF Produced and Purchased:				
Actual	55,379,479	61,502,606	64,078,244	68,790,041
Estimated—Exhibit No. 30 Docket No. G-13143	57,933,700	61,457,900	63,224,800	64,150,700
Actual, over or (under) estimate	(2,554,221)	44,706	853,444	4,639,341
Natural Gas Purchased				
Actual	47,780,748	55,446,392	58,358,687	63,040,875
Estimated—Exhibit No. 30 Docket No. 13143	51,442,500	55,531,900	57,203,200	57,841,200
Actual, over or (under) estimate	(2,661,752)	(85,508)	1,155,487	5,199,675

(Stated on 1,000 Btu basis)

Q. What conclusion should be drawn from the above comparison?

A. It is apparent that Philadelphia Gas Works has utilized all of the gas which it estimated it would in the Transcontinental certificate case, at the prices paid to its supplier, and at rates to the ultimate consumer which provide the gas company with a handsome rate of return.

Q. Did the witness for Philadelphia Gas Works at Docket No. G-13143 indicate that there would be any savings to the Gas Works by obtaining the supply of gas requested from Transco over the comparable cost of manufacturing equivalent volumes of water gas and oil gas?

A. Yes. Mr. S. Newton Croll, to whom I previously had referred, estimated an operating cost saving in the 1958-59 fiscal year amounting to $68,000 and in the 1959-60 year amounting to $262,000. Since the actual volumes purchased during the four year period have been in excess of the volumes estimated, it is apparent that the

current savings resulting from the use of natural gas would be even greater. Mr. Croll also pointed out that these annual amounts included only savings in operating costs and do not include any saving in the capital investment which would have been necessary to increase the capacity of the manufacturing plants in order to obtain the required supplies of additional manufactured gas.

Q. Did any of the other customer companies at Docket No. G-13143, *et al.*, indicate also that they also would receive cost reductions as a result of the acquisition of the gas supply which Transco proposed in the proceedings to make available to them.

A. Yes. The following companies indicated that savings would be achieved in the indicated amounts:

	Annual Savings
Philadelphia Electric Co.	$2,454,581
Brooklyn Union Gas Co.	7,552,756
Long Island Lighting Co.	545,000
Brooklyn Borough Gas Co.	93,000
	$10,645,337

Q. Have other company customers of Transco and Texas Eastern added load and improved revenues as a result of the increased supplies of gas which have been made available to them?

A. Yes. I reviewed the situation both with respect to United Gas Improvement owned properties and with respect to gas operations of Philadelphia Electric Company. Both of these companies have substantially increased revenues and gas sales since 1958.

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Q. Will you kindly state the amounts of such increases?

A. The 1961 Annual Report of the United Gas Improvement Company to its stockholders indicates that the gas sales have increased from

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14,249,955 Mcf in the year 1957 to 21,433,292 Mcf in the year 1961. This represents over a fifty per cent increase in sales. During the same period the United Gas Improvement Company revenues from sales of gas have increased from $21,580,000 to $31,092,000, an increase of more than 44 per cent.

The sales volumes shown by Philadelphia Electric Company in its 1961 Annual Report show an increase from 23,029 MMcf in 1957 to 29,691 MMcf in 1961, an increase of almost 29 per cent. During this period revenues increased from $32,900,000 to $44,700,000, or 36 per cent. I might add that it appears that certain sales of straight natural unmixed gas by Philadelphia Electric Company are not included in the volumes shown in their 1961 Annual Report to Stockholders, so that the total growth in load has been greater even than indicated.

Q. Have you made a calculation of the impact on gas supply costs of the Philadelphia Gas Works as a result of the variation of one cent per Mcf in the price which Sun receives from its gas sold from the Belle Isle Field, which is covered by its application for a certificate at Docket No. G-15122, consolidated in these proceedings?

A. Yes I have. A one cent increase in Sun's price, if reflected in the rates of United Gas Pipe Line Company and the rates of Texas Eastern Transmission Corporation, would result in an annual increase in the gas supply costs of the Philadelphia Gas Works in the amount of $1,418.

Q. If the rates of the Philadelphia Gas Works were adjusted to reflect such change in the gas supply costs, what would be the effect upon

the average annual bill rendered to a customer using gas for space heating?

A. The change would be approximately five one-thousandth of one cent in the average annual bill per space heating customer.

Q. Mr. Sherwood, what conclusions have you drawn as a result of your studies?

A. I conclude that the distribution companies which I have studied and the public which they serve have not been adversely affected by the attachment of new supplies of gas purchased by Transco and United Gas Pipeline Company (which resells to Texas Eastern), the certification of which is the subject of these proceedings, but that instead the availability of such additional supplies of gas at the contract prices which have been paid therefor, has very materially benefitted the gas distribution industry and the gas consuming public.

UNITED GAS IMPROVEMENT COMPANY
PHILADELPHIA GAS WORKS DIVISION
Financial Results of Operations
1950 -1961

		Year Ended August 31,						
		1950	1951	1952	1953	1954	1955	1956
		(1)	(2)	(3)	(4)	(5)	(6)	(7)
1	Operating Revenues	$34,346,000	$38,613,000	$42,269,000	$45,380,000	$ 47,626,000	$ 51,981,000	$ 57,744,0
	Operating Expenses:							
2	Gas supply - Current	13,631,000	14,894,000	15,741,000	18,835,000	20,083,000	22,403,000	24,591,0
3	Gas purchased refunds	--	--	--	--	--	--	--
4	Net Gas supply costs	13,631,000	14,894,000	15,741,000	18,835,000	20,083,000	22,403,000	24,591,0
5	Distribution	4,998,000	5,160,000	5,660,000	5,788,000	6,534,000	6,936,000	7,143,0
6	Merchandising losses 1/	--	--	--	--	--	--	--
7	Customers' accounting and collecting	2,087,000	2,370,000	2,478,000	2,598,000	2,727,000	2,898,000	3,095,0
8	Sales Promotion	731,000	860,000	1,024,000	1,137,000	1,373,000	1,502,000	1,704,0
9	Administrative and general 2/	1,703,000	1,911,000	2,008,000	2,502,000	2,565,000	3,006,000	3,111,0
10	State Gross receipts tax	--	--	--	--	--	--	--
11	Total operating expenses excluding depreciation	23,150,000	25,195,000	26,911,000	30,860,000	33,282,000	36,745,000	39,644,0
12	Excess of revenues over operating expenses excluding depreciation	11,196,000	13,418,000	15,358,000	14,520,000 3/	14,344,000	15,236,000	18,100,0
	Income deductions:							
13	Fee paid to U.G.I.	800,000	800,000	800,000	800,000	800,000	800,000	800,0
14	Return paid to City of Philadelphia	4,733,000	5,133,000	5,200,000	5,200,000	5,200,000	5,200,000	5,200,0
15	Interest on City Bonds	579,000	506,000	577,000	588,000	634,000	732,000	823,0
16	Other	(10,000)	56,000	--	--	--	--	(59,0
17	Total	6,102,000	6,495,000	6,577,000	6,588,000	6,634,000	6,732,000	6,764,0
18	Balance of operating income	$ 5,094,000	$ 6,923,000	$ 8,781,000	$ 7,932,000	$ 7,710,000	$ 8,504,000	$ 11,336,0
	Disposition of operating income:							
19	Renewals and replacements of plant				$ 3,666,667	$ 4,000,000	$ 5,759,299	$ 8,778,0
20	Plant "additions" per agreement				550,000	1,920,000	1,447,500	1,000,0
21	Retirements of funded debt				2,884,186	935,280	1,295,818	1,558,0
2	Total				7,100,853	6,855,280	8,502,617	11,337,0
23	Balance to working capital				$ 832,335	$ 854,806	$ --	$ --
	Gross Utility Plant:							
24	Beginning of year	$71,890,987	$75,571,664	$81,255,888	$89,684,905	$100,896,772	$110,256,982	$119,864,0
25	End of year	75,571,664	81,255,888	89,684,905	100,896,772	110,256,982	119,864,736	130,313,0
26	Average	73,731,325	78,413,776	85,470,397	95,290,839	105,576,877	115,060,859	125,089,0
27	Rate of earnings (before depreciation) on gross utility plant (line 12 ÷ line 26)	15.18%	17.11%	17.97%	15.24%	13.59%	13.24%	14.47%

NOTES:
1/ Combined with other expenses prior to 1959.
2/ Includes miscellaneous taxes in relatively insignificant accounts.
3/ This amount is $250,000 less than the comparable amount shown in the Commonwealth Services report referred to in footnote No. 4. Such difference arrises apparently from a clerical error in footing in such report.
4/ Sources - (1) reports of Controller of City of Philadelphia on annual operations of the Philadelphia Gas Works for the annual period en August 31, 1961 and 1960, and (2) a report dated November 13, 1959 by Commonwealth Services, Inc. to the Chairman of the Gas Commissio of the City of Philadelphia.

OVERSIZE PAGE SEE NEXT FRAME
FOR REMAINDER OF PAGE

(1296)

Sun Oil Company
Docket Nos.
G-13710, G-14245,
and G-15122
Exhibit No. ____

Witness: Sherwood

UNITED GAS IMPROVEMENT COMPANY
PHILADELPHIA GAS WORKS DIVISION
Financial Results of Operations
1950 -1961

	Year Ended August 31,									
	1952 (3)	1953 (4)	1954 (5)	1955 (6)	1956 (7)	1957 (8)	1958 (9)	1959 (10)	1960 (11)	1961 (12)
,000	$42,269,000	$45,380,000	$ 47,626,000	$ 51,981,000	$ 57,744,000	$ 57,091,000	$ 62,124,000	$ 65,572,191	$ 68,718,736	$ 74,232,591
,000	15,741,000	18,835,000	20,083,000	22,403,000	24,591,000	25,442,000	27,423,000	29,431,428	32,087,359	35,162,676
	--	--	--	--	--	--	--	286,345	115,461	2,078,749
,000	15,741,000	18,835,000	20,083,000	22,403,000	24,591,000	25,442,000	27,423,000	29,145,083	31,971,898	33,083,927
,000	5,660,000	5,788,000	6,534,000	6,936,000	7,143,000	7,482,000	7,877,000	6,919,211	7,536,632	8,487,401
	--	--	--	--	--	--	--	(60,708)	24,493	43,219
,000	2,478,000	2,598,000	2,727,000	2,898,000	3,095,000	2,990,000	3,170,000	3,251,774	3,314,581	3,521,902
,000	1,024,000	1,137,000	1,373,000	1,502,000	1,704,000	1,713,000	1,706,000	1,852,848	1,838,093	1,721,685
,000	2,008,000	2,502,000	2,565,000	3,006,000	3,111,000	3,367,000	3,495,000	3,848,367	4,234,609	4,415,817
	--	--	--	--	--	--	--	--	594,300	1,002,000
,000	26,911,000	30,860,000	33,282,000	36,745,000	39,644,000	40,994,000	43,671,000	44,956,575	45,514,606	52,275,951
,000	15,358,000	14,520,000 3/	14,344,000	15,236,000	18,100,000	16,097,000	18,453,000	20,615,616	19,204,130	21,956,640
,000	800,000	800,000	800,000	800,000	800,000	800,000	800,000	800,000	800,000	800,000
,000	5,200,000	5,200,000	5,200,000	5,200,000	5,200,000	5,200,000	5,200,000	5,200,000	5,200,000	5,200,000
,000	577,000	588,000	634,000	732,000	823,000	762,000	688,000	611,618	562,023	512,258
,000	--	--	--	--	(59,000)	--	--	--	--	--
000	6,577,000	6,588,000	6,634,000	6,732,000	6,764,000	6,762,000	6,688,000	6,611,618	6,562,023	6,512,258
000	$ 8,781,000	$ 7,932,000	$ 7,710,000	$ 8,504,000	$ 11,336,000	$ 9,335,000	$ 11,765,000	$ 14,003,998	$ 12,642,107	$ 15,444,382
		$ 3,666,667	$ 4,000,000	$ 5,759,299	$ 8,778,042	$ 6,942,860	$ 9,228,999	$ 8,500,000	$ 10,500,000	$ 9,500,000
		550,000	1,920,000	1,447,500	1,000,000	1,000,000	1,000,000	1,000,000	1,000,000	1,000,000
		2,884,186	935,280	1,295,818	1,558,966	$ 1,813,604	1,943,965	1,949,385	1,955,318	1,961,764
		7,100,853	6,855,280	8,502,617	11,337,008	9,756,464	12,172,964	11,449,385	13,455,318	12,461,764
		$ 832,335	$ 854,806	$ --	$ --	$ (424,086)	$ (406,629)	$ 2,554,613	$ 813,211	$ 2,982,618
664	$81,255,888	$89,684,905	$100,896,772	$110,256,982	$119,864,736	$130,313,779	$139,381,548	$146,098.186	$152,999,005	$160,662,324
888	89,684,905	100,896,772	110,256,982	119,864,736	130,313,779	139,381,548	146,098,186	152,999,005	160,662,324	168,526,281
776	85,470,397	95,290,839	105,576,877	115,060,859	125,089,258	134,847,663	142,739,867	149,548,595	156,830,664	164,594,302
%	17.97%	15.24%	13.59%	13.24%	14.47%	11.94%	12.93%	13.79%	12.25%	13.34%

nts.
in the Commonwealth Services report referred to in footnote No. 4.
oting in such report.
annual operations of the Philadelphia Gas Works for the annual period ending
959 by Commonwealth Services, Inc. to the Chairman of the Gas Commission

Placid Oil Company et al.
Docket Nos. G-13183 et al.

X-61

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SYNOPSIS OF APPLICANTS AND CERTIFICATE DOCKETS

Docket No. G-	Applicant	R.S. No.	Total Price ¢/Mcf 15.025 psia	Buyer	Contract Date	Date of Initial Delivery	Field
13183	Placid Oil Company	19	23.55	Transco	8-13-57	4-10-59	Thibodaux
13184	"	18	23.55	"	8-13-57	3-18-59	Raceland
13197	Berkshire Oil Company (formerly Frankel)	2	23.55	Transco	8-12-57	Not Reported	No. Thibodaux
13710	Sun Oil Company	92	23.55	Transco	10- 7-57	7-22-59	Pointe au Fer
14254	"	101	21.4	"	12-31-57	2-13-59	Vermilion Blk. 76
15122	"	114	23.8	UGPL	5- 1-58	3-22-60	Belle Isle
14109	Hassie Hunt Trust	19	23.55	Transco	11- 1-57	Not Reported	Rousseau
14244	Phillips Petroleum Co.	350	22.2625	Transco	12-23-57	5-15-59	W. Cameron: Blks. 39&40 Eugene Is.: Blks. 129A, 172 & 18¼
14351	The Pure Oil Company	39	21.4	Transco	1-16-58	2-13-59	Vermilion Blk. 76
17337	J. Ray McDermott & Co., Inc.	12	23.55	Hope	11-14-58	12-17-59	W. Cameron Blk. 33
17338	Kilroy Properties, Inc.	3	23.55	Hope	12- 8-58	12-17-59	Bayou Pigeon
17340	Callery Properties, Inc.	2	23.55	Hope	12-10-58	12-17-59	Little Bayou Pigeon
17341	"	none	23.55	"	12-16-58	—	W. Rayne
17342	Ocean Drilling & Expl. Co.	1	23.55	Hope	10-23-58	12- 1-59	E. Cameron Blk. 4
17343	"	2	23.55	"	12-13-58	12- 1-59	Bayou Pigeon
17398	Caroline Hunt Sands	5	23.55	Hope	8-13-58	Not Reported	So. Thornwell
17399	Sid W. Richardson	2	23.05	Hope	10-17-58	9-16-60	S. Rayne, Maxie, Woodlawn Abbeville & Jefferson Is.
17413	Mississippi River Fuel Corp.	14	23.55	Hope	10-27-58	12- 1-59	E. Cameron Blk. 4
17560	Shell Oil Company	215	23.55	Hope	11-25-58	12- 1-59	Bayou Pigeon
16388	The Superior Oil Company	89	23.8	UGPL	9- 8-58	9- 1-59	Bayou Penchant, Four Isle Dome & Palmetto Bayou
16380	"	78	21.4	Transco	9-17-58	Not Reported	Vermilion Blks. 71 & 76

DEC 7 1962

Hearing Exhibit No. X-62 **(2115)**

CALLERY PROPERTIES, INC.

SUMMARY OF THE RESULTS OF THE COST OF SERVICE STUDIES PRESENTED IN EXHIBITS ___(B), ___(C), AND ___(D) EXPRESSED IN CENTS PER MCF AT 15.025 PSIA

Description	South Louisiana		Total All Areas Combined	
	1958	1960	1958	1960
Average gas revenue at approved rates	14.15¢	16.39¢	13.88¢	16.62¢
Cost and expenses applicable to gas before Federal income taxes:				
From Exhibit ___(B) which is based on sales realization allocations with an allowance of 3.5¢ per Mcf for unsuccessful exploration and development costs	20.25¢	21.84¢	20.90¢	20.56¢
From Exhibit ___(C) which is based on allocation methods used by the Commission in "CATCO" Opinion No. 351	31.33¢	24.02¢	31.98¢	22.73¢
From Exhibit ___(D) which is based on allocation methods used by Presiding Examiner Marsh in Docket Nos. G-9065, et al, or the Commission in "CATCO" Opinion No. 351	34.89¢	29.11¢	35.95¢	29.02¢

Hearing Exhibit No. X-66 (2131)

Docket Number G-17340, et al.
Exhibit X-66 (E)
Witness Gaston C. Jones
Page 1

...ification
dated DEC 7 1962

CALLERY PROPERTIES, INC.

Southern Louisiana Area

FEDERAL POWER COMMISSION
Docket No. G-13183, et al.
Hearing Ex. No. X-66
Date Identified 6/20/62
Date Admitted EXCLUDED 6/20/62
OFFER OF PROOF

Excess (Deficiency) of Investment and Finding Costs over
Present Value of Estimated Future Net Revenue and Drilling Results

For the years 1954 to 1959, inclusive

	(A)	(B) 1954	(C) 1955	(D) 1956	(E) 1957	(F) 1958	(G) 1959	(H) Total
	Excess (deficiency) of investment and finding costs over present value of estimated future net revenue:							
1.	Investment and finding costs	$ 1,958,804	4,435,772	6,212,520	3,916,152	5,283,634	5,377,242	27,184,124
	Estimated future revenue:							
2.	Gas	6,027,339	933,234	5,394,268	2,608,580	2,831,197	3,434,363	21,228,981
3.	Oil	3,242,524	2,122,352	3,002,281	1,974,282	22,974,134	8,962,869	42,278,442
4.	Total	9,269,863	3,055,586	8,396,549	4,582,862	25,805,331	12,397,232	63,507,423
	Estimated future costs:							
5.	Operating	654,760	541,108	937,552	433,653	2,659,499	1,751,156	6,977,728
6.	Workover	149,972	309,339	230,544	110,190	328,358	157,346	1,285,749
7.	Total	804,732	850,447	1,168,096	543,843	2,987,857	1,908,502	8,263,477
8.	Estimated future net revenue	$ 8,465,131	2,205,139	7,228,453	4,039,019	22,817,474	10,488,730	55,243,946
9.	Present value of estimated future net revenue (discounted at 6%)	$ 4,433,948	1,705,769	3,401,449	2,057,370	9,892,792	6,351,023	27,842,351
10.	Excess (deficiency) of investment and finding costs over present value of estimated future net revenue	$ (2,475,144)	2,730,003	2,811,071	1,858,782	(4,609,158)	(973,781)	(658,227)
	Drilling results:							
	Producing wells:							
11.	Exploratory	2	1	2	2	7	3	17
12.	Development	3	10	8	5	22	19	67
	Dry holes:							
13.	Exploratory	4	8	8	3	7	4	34
14.	Development	-	5	4	6	4	8	27
15.	Total wells drilled	9	24	22	16	40	34	145
	Gross salable reserves discovered:							
16.	Gas - MCF	42,269,000	8,544,000	59,010,000	37,405,000	48,870,000	76,698,000	272,796,000
17.	Oil - barrels	1,647,492	1,149,575	1,704,854	1,297,722	18,173,469	6,704,725	30,677,837
	Net salable reserves discovered:							
18.	Gas - MCF	34,731,000	5,869,000	30,166,000	13,958,000	14,290,000	17,699,000	116,713,000
19.	Oil - barrels	1,000,898	723,805	987,250	676,150	7,805,656	3,042,021	14,337,780

Docket Number G-[illegible]340, et al.
Exhibit (E)
Witness Gaston C. Jones
Page 1-A

CALLERY PROPERTIES, INC.

Southern Louisiana Area

Investment and Finding Costs

For the years 1954 to 1959, inclusive

(A)	(B) 1954	(C) 1955	(D) 1956	(E) 1957	(F) 1958	(G) 1959	(H) Total
1. Lease acquisition costs	$ 522,521	920,531	654,789	855,751	566,160	795,811	4,315,563
2. Lease rentals paid	167,792	179,766	305,479	290,368	257,842	198,532	1,399,779
3. Geophysical costs	162,161	148,967	101,183	60,333	65,624	104,380	642,648
4. Lease equipment costs	45,472	174,214	198,712	137,344	250,994	276,235	1,082,971
5. Well costs	1,060,858	3,012,294	4,952,357	2,572,356	4,143,014	4,002,284	19,743,163
6. Total investment and finding costs	$ 1,958,804	4,435,772	6,212,520	3,916,152	5,283,634	5,377,242	27,184,124

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Hearing Exhibit No. X-67

CALLERY PROPERTIES, INC.

PREPARED TESTIMONY OF GASTON C. JONES

Q. Will you please state your name and address. A. My name is Gaston C. Jones, and my business address is 400 Bank of the Southwest Building, Houston 2, Texas.

Q. By whom are you employed and in what capacity? A. I am vice president and director of F. A. Callery, Inc. and treasurer, assistant secretary, and director of Callery Properties, Inc. I am also employed in a financial and administrative capacity by Francis A. Callery, Agent, a partnership.

Q. Will you please describe briefly your general educational background and business experience. A. I received a B.S. degree with a major in accounting from the University of Mississippi in 1940; however, my studies there included more emphasis on economics than accounting. Following my graduation from the University of Mississippi, I attended Northwestern University for one year during which time I undertook graduate studies in accounting and taxation. In Chicago during the summer of 1941, I was employed by Arthur Andersen & Co., a firm of international accountants, for its Houston office. From September 1941 to the middle of 1950, I was associated with the Houston office of Arthur Andersen, having been engaged in public utilities work and in oil and gas audit work for two years and later in tax work.

In mid-1950, I resigned as a manager from Arthur Andersen & Co. and became associated with the predecessor of F. A. Callery, Inc. in

the capacity which I now serve with F. A. Callery, Inc. I am a certified public accountant in the State of Texas and am a member of the American Institute of Certified Public Accountants and the Texas Society of CPA's. For several years, I have also been active in the American Management Association and have been discussion leader for several seminars conducted by that association on the job of the financial executive in large and small companies. I have acted in this capacity in Dallas, New York, and San Francisco.

Q. Would you describe briefly the nature of the business carried on by Callery Properties, Inc. and the other Callery entities by whom you are employed. A. F. A. Callery, Inc. acts as operator and agent for approximately 300 participants, including individuals, estates, trusts, and corporations who engage in the exploration for and the development and operation of oil and gas properties. Title to the properties is held by Callery Properties, Inc., acting as nominee for participants in the various Callery ventures. Income from the properties is collected by the nominee corporation and is distributed monthly to the various participants and to royalty owners. Thus, Callery Properties, Inc. acts merely as a conduit for the receipt and distribution of income applicable to properties for which it holds record title. Operating expenses are paid by F. A. Callery, Inc., the operating company, and are reimbursed to it by the participants. Development costs are also handled in this manner. On the other hand, exploration costs are paid by Francis A. Callery, Agent (a partnership), such funds being provided to the Agent by the participants.

Callery Properties, Inc., being purely a nominee company, owns no interests in oil and gas properties for its own account and merely

holds record title for the various participants for which it acts as nominee. Callery Properties, Inc., as nominee or agent for the various participants, also receives and distributes to them their proportionate shares of oil and gas income from the various properties for which it acts as nominee. This corporation also distributes oil and gas income to the royalty owners for the various properties. Callery Properties, Inc. has no power to act for the participants without their approval except for purposes of holding record title and for receiving and distributing income to them. The standard form of Nominee Agreement between Callery Properties, Inc. and each participant for which it acts as nominee in part provides:

> "Promptly upon receipt by nominee of any proceeds from the sale or other disposition of oil, gas, or other minerals produced and saved from Owner's Property Interests, which said proceeds may be paid to nominee in its name but for the account of Owner pursuant to marketing arangements authorized by Owner, Nominee shall remit or cause to be remitted to Owner his proportionate share of such proceeds . . . Nominee shall also promptly remit to Owner any other proceeds received by Nominee for Owner's account . . ."

Further, by separate agreements the various participants have specifically authorized Callery Properties, Inc. to represent them in matters concerning the Federal Power Commission. In all instances where Callery Properties, Inc. has received proceeds from the sale of jurisdictional gas for the benefit of the participants for which it acts, such income has been distributed to such participants, except where Callery Properties, Inc. has had notice from the Federal Power Commission that a portion of such proceeds may be subject to refund. In such instances, Callery Properties, Inc. has, with the approval of the Federal Power Commis-

sion, deposited the portion of such proceeds which may be subject to refund in trust accounts which require the approval of the Federal Power Commission before they can be distributed or otherwise disposed of by the trustees of such trusts.

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Q. Would you please describe generally the nature of your responsibility and duties in the Callery organization. A. As a member of the management group of the Callery operation in its various phases, my duties are varied but are principally those having to do with all phases of the financial aspect of the business. I have the responsibility of negotiating, subject to individual investor approvals, all gas contracts. I also carry responsibility for all dealings with the Federal Power Commission in connection with such contracts.

Q. Have you previously testified as a witness before the Federal Power Commission? A. Yes. I appeared and testified on behalf of Callery Properties, Inc. in the certificate proceedings held in Docket Nos. G-17340 and G-17341 in the early part of 1959. My testimony in those dockets appears in the record at T. 178-202 in the consolidated proceedings in *Texas Gas Transmission Corporation, et al.*, Docket Nos. G-17335, et al.

Q. What is the general subject and purpose of your testimony in these remanded proceedings? A. To review briefly the history of these proceedings, Callery Properties, Inc. filed applications with the Commission in Docket Nos. G-17340 and G-17341 on December 24, 1958, seeking permanent certificates of public convenience and necessity for two new sales of natural gas to Hope Natural Gas Company in the Bayou Pigeon and West Rayne fields, Iberia and Acadia parishes, Louisiana. The new sales were proposed to be made under the terms and conditions and at the initial

prices set out in two contracts between Callery Properties, Inc. and Hope, dated December 10, 1958 and December 18, 1958.

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On February 9, 1959, the Commission consolidated Callery's applications with related producer and pipeline certificate applications for purposes of hearing. Hearings were held and concluded, and on August 10, 1959, the Commission issued its Opinion No. 327 and order in *Texas Gas Transmission Corporation, et al.;* Docket Nos. G-17335, et al.; 22 F.P.C. 378, granting permanent unconditioned certificates to Callery Properties, Inc. in the aforementioned dockets upon a finding that Callery's proposed sales to Hope were required by the public convenience and necessity.

Pursuant to the unconditional certificate granted in Docket No. G-17340, Callery Properties, Inc. filed its December 10, 1958 contract with Hope as its FPC Gas Rate Schedule No. 2 and on December 17, 1959 commenced deliveries of gas to Hope from the Bayou Pigeon Field.

On December 8, 1960, the U. S. Court of Appeals for the District of Columbia Circuit, reversed the Commission's August 10, 1959 order insofar as it granted unconditional certification of the initial prices proposed by Callery and the other producer applicants and remanded the case to the Commission with instructions to hold further proceedings in which Callery and the other producers might, if they so choose, either augment the record so as to support a certification without price condition or seek a certification appropriately conditioned.

Following the Supreme Court's denial of certiorari on April 17, 1961, the Commission consolidated the remanded proceedings in Callery's Docket Nos. G-17340 and G-17341

with the South Louisiana Area Rate Proceeding in Docket No. AR61-2 on May 10, 1961. On January 10, 1962, the Commission issued its order imposing a refund condition with respect to the price "which may hereafter be found to be required by the public

convenience and necessity in Callery Docket Nos. G-17340 and G-17341." On March 7, 1962, the Commission severed Callery's dockets from the Area Proceeding in AR61-2 and at the same time provided for this hearing.

I appear as a witness in these reopened proceedings in support of the initial prices contained in Callery's contracts with Hope covering sales of natural gas from the Bayou Pigeon and West Rayne fields. While no deliveries or sales of gas have yet been made to Hope in the latter field, as the Commission properly noted in its order of January 10, 1962, it is Callery's position in these remanded proceedings that the sales of gas to Hope involved in these dockets are required by the public convenience and necessity at the initial contract price of 21.5¢ per MCF, plus applicable tax reimbursement, as provided for in the contracts with Hope.

Hearing Exhibit No. X-68

TESTIMONY OF GASTON C. JONES

Filed with Exrs. Certification dated Dec. 7, 1962.

A. . . . Not only are Callery's sales to Hope required by the public convenience and necessity at that price, but it is Callery's position that a price of not less than 21.5¢ per MCF, plus tax reimbursement, is necessary from the stand-

point of the over-all financial requirements of the Callery investors.

Q. Has Callery Properties, Inc. requested Arthur Andersen Co. to prepare and present cost of service evidence in these reopened proceedings in support of the initial price provided for in its contracts with Hope? A. Yes. Callery Properties, Inc. requested Arthur Andersen to prepare cost of service evidence to support the initial contract price called for in our West Payne and Bayou Pigeon gas contracts. I believe that the studies so prepared and to be presented in this hearing conclusively show that not only are the prices called for in the two subject

contracts just and reasonable and in the public interest, but also these studies show that the contract prices are substantially lower than prices which could be justified by Callery on the basis of its financial requirements. I should further point out that the studies of Arthur Andersen & Co. were based on theories followed by the Federal Power Commission staff and by the Commission in recent cases.

In addition to the studies prepared by Arthur Andersen & Co. for Callery, Callery has participated with three other independent producers involved in these proceedings in a joint study which, in essence, shows that the producer group participating in such study cannot expect to receive a fair return on their investments in oil and gas exploration and development during the period from 1954 through 1959. This study, presented by Mr. Irwin F. Sentilles, partner of Peat, Marwick, Mitchell & Co., shows that over the entire life of the various fields discovered and developed during that period by these independent producers, the income to be received will provide substantially less than a 6% annual return on investment.

(2140)

Q. Have you prepared exhibits or have exhibits been prepared under your supervision reflecting the results of Callery's study to which you have just referred, this being the study participated in by Callery jointly with three other independent producers and for which the combined results are included in Exhibit —— presented by Mr. Irwin F. Sentilles, partner of Peat, Marwick, Mitchell & Co.? A. Yes. Such an exhibit has been prepared under my supervision.

Q. Do you have before you the document marked Exhibit No. ——(E) for identification and which appears in the bound volume entitled "Callery Properties, Inc., Prepared Testimony and Exhibits"?

2141

A. Yes, I do.

Q. Will you briefly describe this Exhibit No. ——(E)? A. This exhibit presents for Callery alone, the same information as is presented in combined form for Callery Properties, Inc., Kilroy Company of Texas, Inc., Ocean Drilling and Exploration Company, and Richardson and Bass on Pages 1 and 1A of Exhibit —— by Mr. Irwin F. Sentilles, partner of Peat, Marwick, Mitchell & Co. The investment and finding costs shown on Line 1 of this exhibit are the cash expenditures made by the Callery Group during each of the years 1954 through 1959 in connection with the acquisition of leases, the maintenance of leases by payment of rentals, the making of geophysical surveys, the purchase and installation of well and lease equipment, and the cost of drilling wells. Lines 2 through 4 show the estimated revenue to the Callery Group from the sale of gas and oil found by the drilling of wells by the Callery Group during the years 1954 through 1959, the cost of such wells having been included on Line 1. The amounts shown for each year represent estimated future revenue from wells drilled during that year and from the date of completion of the various wells. Royalties, overriding royalties, and other amounts

due to others by virtue of their interests in production have been excluded. It is estimated that these revenues will be spread over periods of up to 40 years in the case of some of the wells. In some other instances, wells have already been depleted. In the case of gas revenues, the amounts shown were computed on the basis of current prices being received, including amounts being received from the sale of jurisdictional gas, a part of which amounts are subject to refund. Severance or production taxes have been deducted.

2142

Lines 5 through 7 show the estimated cost of operating the producing wells throughout their lives and the cost of all workovers. These figures are based largely on estimates made by consulting engineers. Line 8 is a difference between Line 4 and Line 7. Line 9 is the present value of future income discounted at the rate of 6% as calculated by Mr. Irwin F. Sentilles, partner of Peat, Marwick, Mitchell & Co. in connection with his joint presentation for the four independent producers. Line 10 is the amount shown on Line 1 less the amount shown on Line 9.

As shown by this schedule through Line 10, the Callery Group during the six-year period from January 1, 1964 through December 31, 1959 spent a total of $27,184,124 of investment and finding costs and is expected to receive over the lives of the various properties a total of $55,243,946 for an eventual profit of $27,842,351 before interest, this profit being spread over perhaps a 40-year period. By discounting future cash receipts to present value, using a 6% discount factor, we find the present value of the $55,243,946 future income is only $27,842,351 against the investment and finding cost of $27,184,124. The difference between eventual cash receipts and the discounted present value of those receipts is the interest factor at a 6% rate which is

included in future net revenue. In other words, if the discounted present value of future revenue of $27,842,351 had been invested at the times of the various well completions and in securities bearing 6% compound interest, total interest of $27,401,595 would be earned between the date of the well completion and the time of the actual receipt of income from the sale of production, for a total cash recovery of $55,243,946, the estimated future revenue from production.

2143

Lines 11 through 15 of the exhibit show the results of Callery's drilling operation during the six-year period from January 1, 1954 through December 31, 1959. The number of wells is stated in terms of the number of wells in which Callery participated and does not represent full-interest wells in each case. The classification between exploratory and development wells follows the definitions in the agreements with the various investors in the Callery Group. In substantially all cases the classification as an exploratory well is therefore limited to the first well drilled on a particular block of leases, and in all cases the first well on a particular block is classified as an exploratory well. For that reason some wells listed as development wells on the exhibit would undoubtedly be considered as exploratory wells under normal industry practice, and conversely, a minor number of wells classified as exploratory wells on the exhibit might be classified as development wells under normal industry practice. Lines 16 through 19 show estimates of salable reserves of gas and oil discovered. Lines 16 through 17 show gross reserves including reserves attributable to royalty and overriding royalty interests, fractional interests owned by other operators, etc. in the various wells. Lines 18 and 19 represent Callery's share of these reserves.

Page 1A of the exhibit on Lines 1 through 5 shows by classification of cost the various expenditures which are

summarized on Line 1 of Page 1, and Line 6 of Page 1A shows the total of such costs, this total being carried over to Line 1 of Page 1.

Q. Will you briefly explain the importance of the exhibit No. —— just referred to?

2144

A. This exhibit shows that based on Callery's estimates, the Callery Group over a future period of perhaps 40 years can expect to receive income which in the aggregate will have a discounted present value only $658,227 in excess of its investment of $27,184,124.

During the past several years, at least 20 sales of property interests or groups of property interests have been made by Callery investors. The normal method of calculation of the value of such property interests has been to discount future income to present value using a 6% factor or a factor close to that figure, and then to set a sales price equal to from 55 to 67 per cent of the discounted present value of future net income. This method of determining the sales value of a property interest is frequently used throughout the industry. The percentage of discounted present value is generally determined on the basis of the quality of the property; that is, a high quality producing property might sell for as much as 67% of discounted present value whereas a problem property might sell for as low as 55%. If we assume an average of 61%, the figure midway between those two figures, the sales value of the Callery properties immediately after completion of the various wells would have been $16,983,834 as compared to an investment of $27,184,124.

Q. Mr. Jones, in your opinion, why should Callery Properties, Inc. be allowed to collect the initial contract price as set out in its contracts? A. Francis A. Callery, repre-

senting a group of individual investors, began oil and gas exploration in 1944, and from that time to December 31, 1961, the Callery Group has spent a total of $72,217,000

for exploration, development and operation of oil and gas properties. From 1944 through 1961, gross income (after production and severance taxes) from the sale of oil and gas was $39,312,000, excluding royalties and nonoperating working interests belonging to others. Except for two minor plant interests, the group does not engage in any refining, extraction or product marketing activities.

In 1961, 36.15% of the Callery Group's gross income was from the sale of gas alone, and 51.22% of its gross income was from gas plus associated liquids. Based on company oil and gas reserve estimates and on contract prices (limited to presently certificated prices in the case of jurisdictional gas sales), approximately 52.41% of the Group's future net production income (after operating expenses) will be from the sale of gas, inclusive of the income to be received from the sales of associated liquids. In 1961, the weighted average price received from the intrastate sale of gas, including tax reimbursement, was 17.07¢ on a companywide basis and 18.86¢ for South Louisiana sales only. During the same year, the weighted average for companywide jurisdictional sales was 16.89¢ and for South Louisiana jurisdictional sales was 17.30¢. Had the price received for Bayou Pigeon gas been reduced from the present figure of 23.55¢ to the CATCO price of 20¢, Callery's average companywide jurisdictional gas price for 1961 would have been reduced to 15.84¢, and its average South Louisiana jurisdictional price to 15.85¢. Callery's largest South Louisiana gas reserve is contracted to a nonjurisdictional market for which the purchaser is obligated to take or pay for at least one million cubic feet per day for each six billion

cubic feet of reserves in place at January 1, 1962, the effective date of the two contracts under which such gas is being sold. This is a more rapid rate than provided for

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in any of Callery's jurisdictional sales and was a material factor in Callery's decision to contract at the price specified.

In 1961, 38.41% of the Callery Group's gas income was from the sale of nonjurisdictional gas and by 1963 this percentage is expected to be substantially higher.

The Callery Group is only one of many similar groups of individual investors exploring for, developing and producing oil and gas in the United States. There is no question in my opinion but that these groups, together, have and are furnishing a significant quantity of gas to the nation's economy. Callery and other similar investment groups maintain staffs of highly qualified exploratory geologists, geophysicists and other technicians and are an important segment of the business of oil and gas exploration in this country.

The producing oil and gas property interests of these investment groups are owned either directly or through nominee companies by the individual investors. To my knowledge, in no instance does the group operator have the right to retain proceeds from the sales of oil and gas production for use in further exploration activities. The individual investor agrees to participate in exploration only on a deal-to-deal, quarterly, or annual basis and can withdraw from exploration at the end of the agreed period, keeping the property interests in which he has participated. Thus, the investment groups must constantly offer to the current investor and to the potential investor, the prospect of an economically attractive investment or almost immediately go out of the exploratory business. Our business

is much more immediately sensitive to changes in the economics of exploration than is the integrated oil company or the independent producer corporation.

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The Callery Group's annual expenditures for oil and gas exploration have decreased materially during the last few years. For 1955 and 1956, the average annual exploratory expenditure rate was $3,811,000 per year. Such expenditures have declined for each succeeding year over the previous one, except in one instance. The average exploratory expenditure for the years 1957 through 1961 was down to $2,267,000, and for 1961, alone, the expenditure was $1,930,000 which is only 51 per cent of the average annual expenditure for 1955 and 1956. This, in my opinion, is due to the decline in attractiveness of the oil and gas exploration climate over the past few years. If Callery did not have a superior record of finding economically attractive hydrocarbon reserves and if we had not had nonjurisdictional gas markets available to us, the picture would have been much more bleak.

The independent producer segment of the industry, including the investment groups which are a vital part, has furnished an important contribution to the gas reserves of the country. Because of the many problems facing the oil and gas producing industry today, even the allowance by the Federal Power Commission of all arms' length negotiated gas prices, including escalations, would not result in a healthy industry. In my opinion, the true economic plight of the major oil companies and the larger independents, particularly the incorporated entities, is not reflected in their financial statements because traditional accounting concepts do not properly reflect costs of replacing hydrocarbon reserves which are being produced. Many of the larger producers are now selling gas production which was

discovered at relatively low cost many years ago and for which most costs were charged off in those years.

2148

From an accounting standpoint the simple expedient of reducing exploration and development drilling in a current year will result in a commensurate increase in net income for that year. Thus, the true measure of the current economic incentive for exploration and development of additional gas reserves is the cost of current exploration and development in relation to the current value of oil and gas reserves available for future production and sale.

According to the American Petroleum Institute's estimate of proved reserves of crude oil, natural gas liquids, and natural gas, at December 31, 1960, as brought out in the testimony of Mr. Durst and in his exhibits, the gas reserve life in terms of years of supply has declined from 32.5 years of future supply in 1946 to 19.9 years in 1961. During that 16-year period, reserves, in terms of years of future supply, increased in only one year—1958.

According to a preliminary report on the National Fuels and Energy Study recently released by the Senate Interior Committee Staff in connection wtih the Interior Committee's study on National Fuels Policy (Staff of Senate Comm. on Interior and Insular Affairs, 87th Cong., 2d Sess., National Fuels and Energy Study (Draft Completed as of March 23, 1962), Comm. Print No. 2), it is estimated that total U. S. energy consumption by 1980 will be roughly double the 1960 level. In 1960, gas furnished 31.4% of the total energy demand. The Committee Staff's preliminary report estimates that by 1980, gas will furnish 29% of the total energy demand. Thus, the Committee Staff estimates that by 1980 annual gas demand in the United States will be 84.7% greater than in 1960. Again, going back to the

American Petroleum Institute data to which I have previously

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referred, 1960 net gas production in the United States was 13.09 trillion cubic feet; therefore, based on the Committee Staff estimate, by 1980 the total annual U. S. gas demand will be 24.18 trillion cubic feet. Even if the industry were able to maintain today's quantity of proven known gas reserves which the American Petroleum Institute estimates at 267.7 trillion cubic feet at December 31, 1961 (and in my opinion, at today's exploration level the maintenance of that reserve would be highly doubtful), in 1980 we would have a reserve equal to only 11.07 years' supply at the 1980 estimated consumption level.

If we assume the annual gross increase in gas reserves for each of the 20 years between 1960 and 1980 to be 19.73 trillion cubic feet, which according to the A.P.I. referred to above is the average increase, including revisions, for each of the five years between January 1, 1956 and December 31, 1960, and if we further assume a ratable annual increase in demand to a level of 24.18 cubic feet in 1980, the gas reserve figure at the end of 1980 would be 28.77 cubic feet, a quantity sufficient for only 11.65 years of demand at the predicted 1980 level. It should be mentioned that in only one year out of the last four have reserve increases been as high as the five-year average from 1956 through 1960.

Since the known prime "oil country" areas in the United States have now been largely explored down to the depths usually penetrated in those areas, in my opinion, an average annual gross gas reserve addition rate of 19.73 trillion cubic feet (the average for 1956-1960) over the next 20 years would be very difficult to attain and the only possible means of attaining that rate would be to drill much deeper and to explore

heavily in areas which are presently high risk areas. This would mean a much higher per well drilling cost and a higher dry hole ratio, both of which would increase gas finding costs.

The Interior Committee Staff concludes that as present young reservoirs are drilled out and representative new information is developed on older reservoirs, present reserve estimates will be revised upward in substantial amounts. Certainly it may be reasonably expected that so-called "known reserves" will be increased by these two factors, but it should also be remembered that according to the A.P.I. statistics previously referred to, 67.5% of the reported increases in reserves during the ten years from 1951 through 1960 or an average of 12.22 trillion cubic feet of gross additions per year, have resulted from these two factors, and therefore, the gas reserve additions from new discoveries in the past ten years are only 32.5% of the total additions reported. During these last ten years (from 1951 through 1960) the increase from new discoveries has averaged only 5.89 trillion cubic feet per year as compared with 1960 production of 13.09 trillion cubic feet.

Certainly then, if the United States is to maintain a safe level of gas reserves in terms of years of demand, the current exploration rate must be materially increased over the present level. The necessary increase in the current level of exploration activity will obviously require, over a period of years, the additional investment of billions of dollars over the present rate.

If the producing industry today is weakened by the application of unsound and unrealistic regulatory policies which discourage this additional investment, it cannot, in my opinion, be revitalized either

with or without government help, except over a long period of time. Many major exploratory projects eventually resulting in the availability of large gas supplies to the consumer frequently require years—perhaps six or eight—between the germination of the ideas and their complete fruition. Before new projects could be undertaken, much time would be needed for reassembling and training staffs of the highly trained technicians which have been responsible for the leadership of this country's oil producers in world exploration. The oil and gas industry, unlike the coal, water power and electric industries, cannot depend on procedures written in some construction or operating manual for expanding capacity. The oil and gas industry must constantly depend on new ideas and new techniques for finding new reserves. Even given these ideas, the elapsed time necessary for producing new supplies is long.

The only means of private industry providing an adequate gas supply for the future is to allow the industry to receive for both old and new reserves of gas, prices high enough to provide income and an economic climate sufficiently attractive to allow industry to replace gas reserves which it is now producing and to increase the quantity of those unproduced reserves sufficiently to provide for forecasted increased consumption rates. I have previously stated that Callery, as a member of this industry, which is responsible for the discovery and development of additional gas supplies, must be assured of an incentive sufficiently attractive to secure continuing supplies of investment capital. Without that incentive it will be unable to continue to contribute new gas supplies to the economy.

In my opinion, the cost studies prepared and sponsored by

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Mr. Goodman of Arthur Andersen & Co., as well as the net cash flow study sponsored by Mr. Durst on behalf of Callery and the other producers participating in that study, amply demonstrate that the initial price proposed by Callery Properties, Inc., in these dockets is required by the public convenience and necessity.

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Hearing Exhibit No. X-70

PREPARED TESTIMONY
of
M. PAUL LeBLANC, JR.

1. Q. Please state your name and address. A. My name is Paul LeBlanc, Jr. I live at 519 Audubon Street, New Orleans, Louisiana.

2. Q. With whom are you associated, and in what capacity? A. I am a partner in the firm of Arthur Andersen & Co., an international firm of accountants and auditors. We have offices in most of the major cities in the United States and in a number of countries outside of the United States. My office is located at 400 Whitney Building, New Orleans, Louisiana.

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3. Q. Will you give us a brief resume of your educational qualifications and experience? A. I became associated with the firm of Arthur Andersen & Co. upon graduating from Louisiana State University in 1949 and have been with that firm continuously to the present date. I was admitted to partnership in the firm on July 2, 1956. I am a member of the American Institute of Certified Public Accountants and the Louisiana Society of Certified Public

Accountants. I am a certified public accountant in the States of Louisiana, Texas, Illinois, Wisconsin, Michigan, California, and several other states. Most of the period that I have been with the firm of Arthur Andersen & Co. has been devoted to handling audit and other responsibilities for oil and gas producing companies.

4. Q. Will you state the names of some of the natural gas companies by whom Arthur Andersen & Co. is employed? A. As a firm, we are independent accountants for a very substantial percentage of the Interstate natural gas companies in this country, including, among others, Colorado Interstate Gas Company, Natural Gas Pipeline Company of America, Texas Illinois Natural Gas Pipeline Company, Tennessee Gas Transmission Company, Transcontinental Gas Pipe Line Corporation, Michigan-

Wisconsin Pipe Line Corporation, Kansas-Nebraska Natural Gas Company, Columbia Gas, Northern Natural Gas, and several others.

5. Q. Will you state the names of some of the independent oil and gas producers by whom Arthur Andersen & Co. is employed? A. As a firm we are independent accountants for a broad cross section of the industry and number among our clients Texaco Inc., Champlin Oil & Refining Company, The Pure Oil Company, Skelly Oil Company, Southwest Gas Producing Company, and many others.

6. Q. Have you previously appeared before this Commission as a witness. A. Yes. I testified in independent producer rate proceedings involving Mecom Petroleums, Docket No. G-10357 and C. V. Lyman, Docket No. G-9289.

7. Q. What was Arthur Andersen & Co. employed to do in connection with this proceeding? A. We were advised that R. R. Frankel and J. R. Frankel (Berkshire Oil Company,

Successor) had this proceeding pending before the commission, involving gas being delivered from the North Thibodeaux Field in South Louisiana under a contract dated August 12, 1957. At this point, I believe it would be well to give a brief history of the ownership of the properties

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involved in this proceeding.

At the time the before mentioned gas contract was entered into, these properties were owned by M. Frankel & Sons, a partnership consisting of M. Frankel, R. R. Frankel, J. R. Frankel, L. R. Frankel and Mae Frankel Shalett. Title to the properties was in the name of either R. R. Frankel or J. R. Frankel, acting as agents for the partnership. On August 1, 1960, these properties, together with all other oil and gas properties of M. Frankel & Sons, were sold to Berkshire Oil Company, subject to a substantial production payment. The stockholders of Berkshire Oil Company are the same as the partners of the now liquidated M. Frankel & Sons partnership. Berkshire, therefore, is the successor corporation to M. Frankel & Sons. Effective November 2, 1961, the properties involved in this proceeding, together with all other oil and gas properties of Berkshire, were sold to Continental Oil Company and Berkshire is now in the process of liquidation. The stockholders of Berkshire, therefore, are concerned with this proceeding only to the extent that the period from initial delivery of gas from the field to November 2, 1961, is affected by this proceeding.

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We were requested by management of Berkshire to advise them on the filing of cost of service data in this proceeding. We had previously prepared a company-wide cost of service study for M. Frankel & Sons (Berkshire's predecessor) for the year ended September 30, 1959. Since the year

ended September 30, 1959, is the most logical test year for the properties involved in this proceeding, the company decided to introduce as evidence in this proceeding the cost of service study previously prepared by us.

8. Q. Why do you feel that a company-wide basis would be applicable when only the one field, North Thibodeaux, is here involved? A. Because this conforms more closely to the economic principles applicable to entities in the oil and gas business. No producer looks to each and every property to contribute equally to profits. Indeed, some may not be profitable at all, and these units must, in effect, be carried by other more prolific properties. On an overall basis, the producer looks to the total profits to produce a fair return on his overall investment.

Furthermore, significant portions of the cost of finding and producing gas cannot be charged directly to specific properties and must of necessity be subject

to cost allocations. It is axiomatic, under these circumstances, that the smaller the unit for which costs are determined, the less reliable will be the results.

9. Q. Why do you believe that the year ended September 30, 1959 is the most logical test year? A. Because this was the first year of gas deliveries under the contract involved in this proceeding and, also, because this is the most recent complete year prior to the sale of the properties subject to a substantial production payment.

10. Q. Was the cost of service study for the year ended September 30, 1959, prepared by you or under your supervision? A. It was prepared under my supervision.

11. Q. Will you state, generally, the methods followed in making the study and sources from which you drew your

information? A. Actually we prepared three different studies which are indexed as Exhibits I, II, and III in the cost of service presentation. Detailed information on the methods followed, sources of information, allocation factors and how the amounts were arrived at is given in the *Introduction* to the cost of service presentation and in the *Explanatory Statements*

in front of each of the three exhibits. Therefore, I will limit my statements here to a brief general explanation of each of the three exhibits.

First I would like to make it clear that I do not believe that the traditional utility type cost of service regulation is appropriate in the regulation of independent gas producers. However, without conceding its relevancy, a cost of service study (Exhibit I) was prepared under my supervision along the lines of traditional utility rate-making concepts. In general, Exhibit I was prepared on the basis of capitalizing and amortizing all nonproductive exploratory costs since inception of M. Frankel & Sons and allocations, where necessary, were made on the BTU method. This method, in my opinion, is the most objective, logical, reasonable, and convenient method of allocation which can be consistently applied in the costing of natural gas jointly produced with other hydrocarbons.

In addition to Exhibit I, I supervised the preparation of Exhibits II and III, which are cost determinations computed within the framework of the theories frequently used heretofore by the Federal Power Commission Staff in rate proceedings involving independent gas producers. In my opinion, certain of these theories and methods are improper and unsound

for use in the determination of the cost of gas. Such cost determinations are presented solely to demonstrate the results that would be obtained using theories frequently sponsored by the Staff and may not be taken as concurrence by me in the methods and theories employed therein. In Exhibits II and III, allocation of joint costs are made on a sales and/or reserve realization basis and nonproductive exploratory costs are considered as a current expense. The only difference between Exhibits II and III is that, in computing the allocation factors, rate increases subject to refund are excluded in Exhibit II and such increases are included in Exhibit III.

Again at this point, I would like to make it clear that all of the statements made in the *Introduction* to the cost of service presentation and in the *Explanatory Statements* in front of each of the three Exhibits were prepared under my supervision and are hereby adopted by me.

12. Q. What were the results of these studies? A. Exhibit I shows that on the basis of prices received for its jurisdiction gas the company earned a return of 2.47%. Exhibit II indicates a cost of jurisdictional gas, including return, of 23.01 cents per MCF which is 1.86 cents in excess of the company's

average selling price per MCF. Exhibits III indicates a cost of jurisdictional gas, including return, of 24.23 cents per MCF which is 3.08 cents in excess of the company's average selling price per MCF.

EXHIBIT I
SCHEDULE 1

M. FRANKEL & SONS

JURISDICTIONAL GAS OPERATIONS
YEAR ENDED SEPTEMBER 30, 1959

JURISDICTIONAL GAS SALES, including requested rate increases (Schedules 2 and 3)	$1,278,930
COSTS AND EXPENSES (Schedule 2):	
Production taxes	$ 136,573
Lease operating expenses	139,523
General and administrative expenses	176,480
Depreciation, depletion, and amortization	246,178
Amortization of nonproductive exploratory costs	126,004
Regulatory commission expense	25,000
	$ 849,758
NET INCOME BEFORE FEDERAL INCOME TAX PROVISION	$ 429,172
PROVISION FOR FEDERAL INCOME TAXES, at the average effective rate of the individual partners of 76.47%	$ 328,188
NET INCOME AFTER FEDERAL INCOME TAX PROVISION	$ 100,984
RATE BASE—Jurisdictional gas (Schedule 4)	$4,095,554
RETURN THEREON	2.47%

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EXHIBIT II
SCHEDULE 1

M. FRANKEL & SONS

COST OF SERVICE—JURISDICTIONAL GAS
YEAR ENDED SEPTEMBER 30, 1959

	Total Jurisdictional Gas	
	Amount	Cents Per MCF (5,113,953 MCF)
OPERATING COSTS AND EXPENSES (Schedule 2):		
Production taxes	$ 108,845	
Lease operating expenses	65,744	
General and administrative expenses	109,083	
Depreciation, depletion, and amortization	110,415	
Nonproductive exploratory costs	228,094	
Regulatory commission expense	25,000	
	$ 647,181	12.65¢
RETURN AT 12% (Schedule 4)	254,274	4.97
ALLOWANCE FOR FEDERAL INCOME TAXES (Schedule 4)	275,463	5.39
Total cost of service	$1,176,918	23.01¢
JURISDICTIONAL GAS REVENUES, before giving effect to requested rate increases (Schedule 3)	943,146	18.44
REVENUE DEFICIENCY, before giving effect to requested rate increases	$ 233,772	4.57¢
REQUESTED RATE INCREASES (Schedule 3)	138,608	2.71
REVENUE DEFICIENCY, after giving effect to requested rate increases	$ 95,164	1.86¢

EXHIBIT III
SCHEDULE 1

M. FRANKEL & SONS

COST OF SERVICE—JURISDICTIONAL GAS
YEAR ENDED SEPTEMBER 30, 1959

	Total Jurisdictional Gas	
	Amount	Cents Per MCF (5,113,953 MCF)
OPERATING COSTS AND EXPENSES (Schedule 2):		
Production taxes	$ 108,845	
Lease operating expenses	72,899	
General and administrative expenses	118,211	
Depreciation, depletion, and amortization	121,890	
Nonproductive exploratory costs	247,178	
Regulatory commission expense	25,000	
	$ 694,023	13.57¢
RETURN AT 12% (Schedule 4)	261,624	5.12
ALLOWANCE FOR FEDERAL INCOME TAXES (Schedule 4)	283,426	5.54
Total cost of service	$1,239,073	24.23¢
JURISDICTIONAL GAS REVENUES, before giving effect to requested rate increases (Schedule 3)	943,146	18.44
REVENUE DEFICIENCY, before giving effect to requested rate increases	$ 295,927	5.79¢
REQUESTED RATE INCREASES (Schedule 3)	138,608	2.71
REVENUE DEFICIENCY, after giving effect to requested rate increases	$ 157,319	3.08¢

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Hearing Exhibit No. X-72

PREPARED TESTIMONY
OF
ARMAND F. QUERE
WITNESS FOR J. RAY McDERMOTT & CO., INC.
DOCKET NO. G-17337

Q. Please state your name and address. A. Armand F. Quere. My business address is 14th floor Houston Club Building, Houston 2, Texas.

Q. By whom are you now employed and in what capacity? A. I am employed by J. Ray McDermott & Co., Inc. in the capacity of comptroller.

Q. Please give a short resume of your education, any professional societies to which you belong, with a outline of your experience with reference to oil and gas matters. A. I completed my college prep course at College of the Immaculate Conception (Jesuits), New Orleans, Louisiana; had accounting course with the College of Commerce, Tulane University; I had a CPA Review Course with Loyola University, all in New Orleans, Louisiana, and I hold CPA Certificates in the States of Louisiana, Mississippi and Texas. I am a member of the American Institute of Certified Public Accountants and the Texas and Louisiana Society of Certified Public Accountants and Petroleum Accountants Society of Houston. I have been engaged in oil and gas accounting since August of 1923.

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Q. How long have you been employed by J. Ray McDermott & Co., Inc.? A. 14 years.

Q. Please describe briefly your present duties, especially as they relate to the the oil and gas division of J. Ray Mc-

Dermott & Co., Inc. A. The usual duties of a comptroller, which include the supervision of oil division accounting.

Q. I direct your attention to a schedule, titled "J. Ray McDermott & Co., Inc.'s Exhibit 'A', Block 33 Field, Offshore, Cameron Parish, Louisiana, as of March 31, 1962, for Docket No. G-17337." Are you familiar with this schedule and the factual data contained therein? (Said schedule being attached to this prepared testimony) A. Yes, I am familiar with this schedule and the same was prepared by me and under my supervision from the records of J. Ray McDermott & Co., Inc.

Q. Are those facts on Exhibit "A" stated truly and correctly to the best of your knowledge and belief? A. Yes, they are.

Q. Now, Mr. Quere, I ask you, have you made a thorough study with respect to J. Ray McDermott & Co., Inc.'s costs, revenues and income with regard to the oil, gas and mineral leases committed to Hope Natural Gas Company by J. Ray McDermott & Co., Inc. under a Gas Purchase Contract dated November 14, 1958, which Gas Purchase Contract is on file with the Federal Power Commission

as McDermott's FPC Gas Rate Schedule No. 12? A. Yes, I have. From books and records kept by me, or under my immediate personal supervision, and it was from these books and records that I have prepared the previously mentioned document, titled "J. Ray McDermott & Co., Inc.'s Exhibit 'A' for Docket No. G-17337."

Q. What do the figures and information contained on your Exhibit "A" represent, Mr. Quere? A. The cost, income and revenue figures contained on the Exhibit "A" represent McDermott's net cost, income and revenues and do not include any sums applicable to other parties owning an interest in the leases and wells committeed to the Hope Natural Gas Contract. McDermott's interest is a 100%

interest in the Block 33, A-1 Well, and a 50% interest in all other wells. The 100% interest in the Block 33, A-1 Well, is applicable only until McDermott has recovered out of production 100% of all of the cost incurred in drilling, equipping and completing that well, after which McDermott will then own only a 50% interest in that well.

Q. Mr. Quere, do you sponsor and vouch for the accuracy of the cost, income and revenue matter contained in the Exhibit "A" for Docket No. G-17337 which you have just offered and identified as your exhibit? A. I do.

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J. RAY McDERMOTT & CO., INC. EXHIBIT "A", BLOCK 33 FIELD OFFSHORE, CAMERON PARISH, LOUISIANA, AS OF MARCH 31, 1962

FPC DOCKET NO. G-17337

	Amount	
Lease and Well Equipment	$1,623,466	
Capital Expenditures		
Drilling Costs	4,065,835	
Dry Hole Costs	132,750	
Lease Bonus	1,830,213	
Total	$7,652,264	
Operating Expenditures		
Operating Expense	$ 379,026	
Workover Expense	358,704	
Lease Rentals	7,900	
General and Administrative	167,210	
Total	$ 912,840	
TOTAL EXPENDITURES		$8,565,104
Revenue		
Oil	$ 202,528	
Gas*	546,523	
Total	$ 749,051	
Expenditures in Excess of Revenue		$7,816,053

*Includes Plant Products

J. RAY McDERMOTT & CO., INC. EXHIBIT "A", BLOCK 33 FIELD
OFFSHORE, CAMERON PARISH, LOUISIANA, AS OF MARCH 31, 1962, FOR DOCKET

	Year Ended March 31s			
	1958	1959	1960	196
Capital Expenditures				
Lease and Well Equipment	$ 746,654	$ 206,526	$ 564,885	$ 116
Drilling Costs	2,032,186	983,848	1,017,117	27
Dry Hole Costs	-	-	-	-
Lease Bonus	-	-	1,830,213	-
Total	$2,778,840	$1,190,374	$3,412,215	$ 144
Operating Expenditures				
Operating Expense	$ 779	$ 26,921	$ 100,219	$ 11
Workover Expense			104,397	25
Lease Rentals	500		1,630	
General and Administrative	163	9,719	29,740	8
Total	$ 1,442	$ 36,640	235,986	$ 45
Total Expenditures	$2,780,282	$1,227,014	$3,648,201	$ 60
Production				
Oil - Barrels	-	-	7,164	4
Gas - MCF	-	-	560,622	1,24
Revenue				
Oil	$	$	$ 20,693	$ 12
Gas *			120,534	26
Total	$ -	-	$ 141,227	$ 39
Expenditures in Excess of Revenue				

* Includes Plant Products
(1) Effective 4/1/61 - Gas MCF - Net of Shrinkage
Gas Price Used - Contract Price 21½¢ - No Consideration Given to Tax Reimbursement

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FOR REMAINDER OF PAGE

J. RAY McDERMOTT & CO., INC. EXHIBIT "A", BLOCK 33 FIELD
CAMERON PARISH, LOUISIANA, AS OF MARCH 31, 1962, FOR DOCKET NO. G-17337

(2310)

Year Ended March 31st					
1958	1959	1960	1961	1962	Total
$ 746,654	$ 206,526	$ 564,885	$ 116,264	$ (10,863)	$1,623,466
2,032,186	983,848	1,017,117	27,848	4,836	4,065,835
-	-	-	-	132,750	132,750
-	-	1,830,213	-	-	1,830,213
$2,778,840	$1,190,374	$3,412,215	$ 144,112	$ 126,723	$7,652,264
$ 779	$ 26,921	$ 100,219	$ 117,439	$ 133,668	$ 379,026
		104,397	254,126	181	358,704
500		1,630	3,110	2,660	7,900
163	9,719	29,740	82,973	44,615	167,210
$ 1,442	$ 36,640	235,986	$ 457,648	$ 181,124	$ 912,840
$2,780,282	$1,227,014	$3,648,201	$ 601,760	$ 307,847	$8,565,104
-	-	7,164	42,930	17,339	67,433
-	-	560,622	1,245,243	720,786(1)	2,526,651
$	$	$ 20,693	$ 128,499	$ 53,336	$ 202,528
		120,534	267,727	158,262	546,523
$ -	-	$ 141,227	$ 396,226	$ 211,598	$ 749,051
					$7,816,053

et of Shrinkage
e 21½¢ - No Consideration Given to Tax Reimbursement

Hearing Exhibit No.

OCEAN DRILLING & EXPLORATION COMPANY
Summary of Revenues and Costs for Past and Prospective
Production of Hydrocarbon Reserves Found Through December 31, 1961

Line No.	Description	(A) Reference	(B) Volume of Saleable Reserves	(C) Revenues from Saleable Reserves (1)
1.	A. Cost-Revenue Comparison Based on Unallocated Cost of Hydrocarbons:	Sch. 2		
2.	Past Experience: June 1, 1954 through December 31, 1961			$ 2,006,804
3.	Prospective Results: January 1,1962 through Depletion of Reserves			15,756,568
4.	Totals		41,554,228 MCF 3,281,776 Bbls.	$ 17,763,372
5.	B. Cost-Revenue Comparison Based on Costs Classified by Prospect Results:	Sch. 3		
6.	1. Costs Allocated on Basis of BTU's:			
7.	Natural Gas:			
8.	Amounts			
9.	Cents per MCF		41,554,228 MCF	$ 8,869,884
10.	Liquids:		-	21.35¢
11.	Amounts			
12.	Dollars per Barrel		3,281,776 Bbls.	$ 8,893,488
			-	$ 2.71
13.	2. Costs Allocated on Basis of Revenues:			
14.	Natural Gas:			
15.	Amounts			
16.	Cents per MCF		41,554,228 MCF	$ 8,869,884
17.	Liquids:		-	21.35¢
18.	Amounts			
19.	Dollars per Barrel		3,281,776 Bbls.	$ 8,893,488
			-	$ 2.71
20.	C. Cost-Revenue Comparison Based on Costs Classified by Lease Type:	Sch. 4		
21.	1. Costs Allocated on Basis of BTU's:			
22.	Natural Gas:			
23.	Amounts			
24.	Cents per MCF		41,554,228 MCF	$ 8,869,884
25.	Liquids:		-	21.35¢
26.	Amounts			
27.	Dollars per Barrel		3,281,776 Bbls.	$ 8,893,488
			-	$ 2.71
28.	2. Costs Allocated on Basis of Revenues:			
29.	Natural Gas:			
30.	Amounts			
31.	Cents per MCF		41,554,228 MCF	$ 8,869,884
32.	Liquids:		-	21.35¢
33.	Amounts			
34.	Dollars per Barrel		3,281,776 Bbls.	$ 8,893,488
			-	$ 2.71

(1) Revenues from saleable natural gas reserves at initial contract prices excluding severance taxes.

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OCEAN DRILLING & EXPLORATION COMPANY
Summary of Revenues and Costs for Past and Prospective
Production of Hydrocarbon Reserves Found Through December 31, 1961

Schedule 1
Exhibit _____
Jack W. McNutt
Docket Nos. G-17342 &
G-17343

Description	(A) Reference	(B) Volume of Saleable Reserves	(C) Revenues from Saleable Reserves(1)	(D) Costs of Saleable Reserves	(E) Revenue Excess or (Deficiency)
Comparison Based on Unallocated Cost of Hydrocarbons:	Sch. 2				
tence: June 1, 1954 through December 31, 1961			$ 2,006,804	17,176,724	(15,169,920)
e Results: January 1,1962 through Depletion of Reserves			15,756,568	4,467,400	11,289,168
Totals		41,554,228 MCF 3,281,776 Bbls.	$ 17,763,372	21,644,124	(3,880,752)
Comparison Based on Costs Classified by Prospect Results:	Sch. 3				
Allocated on Basis of BTU's:					
ural Gas:					
Amounts		41,554,228 MCF	$ 8,869,884	12,752,439	(3,882,555)
Cents per MCF		-	21.35¢	30.69¢	(9.34)¢
uids:					
Amounts		3,281,776 Bbls.	$ 8,893,488	8,891,685	1,803
Dollars per Barrel		-	$ 2.71	2.71	-
Allocated on Basis of Revenues:					
ural Gas:					
Amounts		41,554,228 MCF	$ 8,869,884	9,290,671	(420,787)
Cents per MCF		-	21.35¢	22.36¢	(1.01)¢
uids:					
Amounts		3,281,776 Bbls.	$ 8,893,488	12,353,453	(3,459,965)
Dollars per Barrel		-	$ 2.71	3.76	(1.05)
Comparison Based on Costs Classified by Lease Type:	Sch. 4				
Allocated on Basis of BTU's:					
ural Gas:					
Amounts		41,554,228 MCF	$ 8,869,884	13,517,777	(4,647,893)
Cents per MCF		-	21.35¢	32.53¢	(11.18)¢
uids:					
Amounts		3,281,776 Bbls.	$ 8,893,488	8,126,347	767,141
Dollars per Barrel		-	$ 2.71	2.48	.23
Allocated on Basis of Revenues:					
ural Gas:					
Amounts		41,554,228 MCF	$ 8,869,884	9,787,447	(917,563)
Cents per MCF		-	21.35¢	23.55¢	(2.20)¢
uids:					
Amounts		3,281,776 Bbls.	$ 8,893,488	11,856,677	(2,963,189)
Dollars per Barrel		-	$ 2.71	3.61	(.90)

(1) saleable natural gas reserves at initial contract prices excluding severance taxes.

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OCEAN DRILLING & EXPLORATION COMPANY
Cost - Revenue Comparison Based on Unallocated Cost of Hyd

Line No.	Description	(A)	(B)	(C)	(D)	(E)	(F)
		Year Ended May 31,					
		1955	1956	1957	1958	1959	196
1.	Volumes of Saleable Reserves:						
2.	Natural Gas:						
3.	MCF	-	-	-	-	-	1,06
4.	MM BTU's	-	-	-	-	-	1,11
5.	Liquids:						
6.	Barrels	-	14,741	10,966	3,021	-	4
7.	MM BTU's	-	81,500	60,600	16,800	-	24
8.	Revenues From Saleable Reserves:						
9.	Natural Gas	$ -	-	-	-	-	22
10.	Liquids	-	35,064	26,756	8,039	-	12
11.	Totals	$ -	35,064	26,756	8,039	-	34
12.	Finding, Developing and Lifting Costs: (1)						
13.	Lease purchase costs	$ 204,000	482,512	35,437	113,844	2,239	2
14.	Lease rentals	-	16,178	8,253	42,917	49,342	2
15.	Geophysical expenses	6,282	13,136	6,875	9,192	14,628	1
16.	Lease equipment and well costs	-	1,594,660	1,848,839	3,142,263	1,994,819	2,18
17.	Lifting and workover costs	-	36,936	243,814	206,784	22,453	10
18.	Total finding, developing and lifting costs	$ 210,282	2,143,422	2,143,218	3,515,000	2,083,481	2,35
19.	Deduct: Work in progress and cost of Undeveloped properties at December 31, 1961						
20.	Total costs applicable to developed properties						
21.	Revenue excess (deficiency)						

(1) Excluding all central office administrative, overhead costs, and severance taxes.

(2) Without giving effect to any time discount of prospective revenues and expenses.

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(2340)

OCEAN DRILLING & EXPLORATION COMPANY
Cost - Revenue Comparison Based on Unallocated Cost of Hydrocarbons

Schedule 2
Exhibit ____
Jack W. McNutt
Docket Nos. G - 17342
& G - 17343

(B)	(C)	(D)	(E)	(F)	(G)	(H)	(I)	(J)	(K)
		Year Ended May 31,			Seven Months Ended Dec.31,	Year Ended Dec. 31,	Total	Prospective	Total Past & Prospective
1956	1957	1958	1959	1960	1960	1961	Past Results	Results	Results
-	-	-	-	1,062,383	1,156,704	1,954,141	4,173,228	37,381,000	41,554,228
-	-	-	-	1,116,000	1,214,000	2,052,000	4,382,000	39,250,000	43,632,000
14,741	10,966	3,021	-	44,279	96,080	237,069	406,156	2,875,620	3,281,776
81,500	60,600	16,800	-	245,000	541,900	1,345,400	2,291,200	16,225,000	18,516,200
-	-	-	-	225,898	246,279	417,144	889,321	7,980,563	8,869,884
35,064	26,756	8,039	-	123,868	268,991	654,765	1,117,483	7,776,005	8,893,488
35,064	26,756	8,039	-	349,766	515,270	1,071,909	2,006,804	15,756,568	17,763,372
482,512	35,437	113,844	2,239	23,908	10,034	105,257	977,231	-	977,231
16,178	8,253	42,917	49,342	29,965	11,308	28,439	186,402	-	186,402
13,136	6,875	9,192	14,628	11,510	8,903	62,237	132,763	-	132,763
1,594,660	1,848,839	3,142,263	1,994,819	2,181,873	1,785,978	2,996,734	15,545,166	-	15,545,166
36,936	243,814	206,784	22,453	107,171	141,567	520,101	1,278,826	4,467,400	5,746,226
2,143,422	2,143,218	3,515,000	2,083,481	2,354,427	1,957,790	3,712,768	18,120,388	4,467,400	22,587,788
							(943,664)	-	(943,664)
							17,176,724	4,467,400	21,644,124
							$ (15,169,920)	11,289,168 (2)	(3,880,752)(2)

severance taxes.

s and expenses.

OCEAN DRILLING & EXPLORATION COMPANY
Computation of Allocated Cost of Products
Based on Classification by Prospect Results

Line No.	Description	(A) Reference	(B) Productive	(C) Oil Only Nonproductive	(D) Oil Only Total	(E) Productive Prospects Productive	(F) Productive Prospects Joint Pr Nonpro
					Classification of Prospect Re		
1.	Total Past and Prospective Costs:						
2.	Lease purchase costs	Sch. 2, Col. (K), Line 13	$ -	8,543	8,543	26,735	515
3.	Lease rentals	Sch. 2, Col. (K), Line 14	-	14,375	14,375	-	143
4.	Geophysical expenses	Sch. 2, Col. (K), Line 15	-	4,653	4,653	-	40
5.	Lease equipment and well costs	Sch. 2, Col. (K), Line 16	2,232,828	1,320,750	3,553,578	7,237,783	3,126
6.	Lifting and workover costs	Sch. 2, Col. (K), Line 17	621,738	-	621,738	5,124,488	
7.	Total past and prospective costs	Sch. 2, Col. (K), Line 18	2,854,566	1,348,321	4,202,887	12,389,006	3,826
	Deduct: Work in progress and cost of						
8.	Undeveloped properties at December 31, 1961	Sch. 2, Col. (K), Line 19	-	(131,831)	(131,831)	(238,681)	(514
9.	Total costs applicable to developed properties	Sch. 2, Col. (K), Line 20	$ 2,854,566	1,216,490	4,071,056	12,150,325	3,311
10.	Costs Allocated on Basis of BTU's:						
11.	Total costs applicable to developed properties				$ 4,071,056		
12.	Allocation of nonproductive prospects:						
13.	From nonproductive prospects to liquids 29.79%	Sch. 5, Col. (I), Line 3			-		
14.	From nonproductive prospects to natural gas 70.21%	Sch. 5, Col. (I), Line 2			-		
15.	Allocation of productive prospects:						
16.	From oil only prospects to liquids 100.00%	Sch. 5, Col. (C), Line 3			(4,071,056)		
17.	From joint product prospects to liquids 27.11%	Sch. 5, Col. (F), Line 3			-		
18.	From joint product prospects to natural gas 72.89%	Sch. 5, Col. (F), Line 2			-		
19.	Total allocated cost of products				$ -		
20.	Costs Allocated on Basis of Revenues:						
21.	Total costs applicable to developed properties				$ 4,071,056		
22.	Allocation of nonproductive prospects:						
23.	From nonproductive prospects to liquids 50.07%	Sch. 5, Col. (I), Line 7			-		
24.	From nonproductive prospects to natural gas 49.93%	Sch. 5, Col. (I), Line 6			-		
25.	Allocation of productive prospects:						
26.	From oil only prospects to liquids 100.00%	Sch. 5, Col. (C), Line 7			(4,071,056)		
27.	From joint product prospects to liquids 46.73%	Sch. 5, Col. (F), Line 7			-		
28.	From joint product prospects to natural gas 53.27%	Sch. 5, Col. (F), Line 6			-		
29.	Total allocated cost of products				$ -		

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Schedule 3
Exhibit
Jack W. McHutt
Docket Nos. G - 17342
& G - 17343

OCEAN DRILLING & EXPLORATION COMPANY
Computation of Allocated Cost of Products
Based on Classification by Prospect Results

ce	(B)	(C)	(D)	(E)	(F)	(G)	(H)	(I)	(J)	(K)
	Classification of Prospect Results								Allocated Cost of Products	
	Productive Prospects									
	Oil Only			Joint Products			Nonproductive			
	Productive	Nonproductive	Total	Productive	Nonproductive	Total	Prospects	Total	Natural Gas	Liquids
), Line 13	$ -	8,543	8,543	26,735	515,757	542,492	426,196	977,231		
), Line 14	-	14,375	14,375	-	143,902	143,902	28,125	186,402		
), Line 15	-	4,653	4,653	-	40,413	40,413	87,697	132,763		
), Line 16	2,232,828	1,320,750	3,553,578	7,237,783	3,126,413	10,364,196	1,627,392	15,545,166		
), Line 17	621,738	-	621,738	5,124,488	-	5,124,488	-	5,746,226		
), Line 18	2,854,566	1,348,321	4,202,887	12,389,006	3,826,485	16,215,491	2,169,410	22,587,788		
), Line 19	-	(131,831)	(131,831)	(238,681)	(514,603)	(753,284)	(58,549)	(943,664)		
), Line 20	$ 2,854,566	1,216,490	4,071,056	12,150,325	3,311,882	15,462,207	2,110,861	21,644,124	-	-
			$ 4,071,056			15,462,207	2,110,861	21,644,124	-	-
), Line 3			-			-	(628,825)	-	-	628,825
), Line 2			-			-	(1,482,036)	-	1,482,036	-
), Line 3			(4,071,056)			-	-	-	-	4,071,056
), Line 3			-			(4,191,804)	-	-	-	4,191,804
), Line 2			-			(11,270,403)	-	-	11,270,403	-
			$ -			-	-	21,644,124	12,752,439	8,891,685
			$ 4,071,056			15,462,207	2,110,861	21,644,124	-	-
), Line 7			-			-	(1,056,908)	-	-	1,056,908
), Line 6			-			-	(1,053,953)	-	1,053,953	-
), Line 7			(4,071,056)				-	-	-	4,071,056
), Line 7			-			(7,225,489)	-	-	-	7,225,489
), Line 6			-			(8,236,718)	-	-	8,236,718	-
			$ -			-	-	21,644,124	9,290,671	12,353,453

OCEAN DRILLING & EXPLORATION COMPANY
Computation of Allocated Cost of Products
Based on Lease Classification

Line No.	Description		(A) Reference	(B) Lease Classifications Oil Only	(C) Joint Products	(D) Non Pro
1.	Total Past and Prospective Costs:					
2.	Lease Purchase Costs		Sch. 2, Col.K, Line 13	$ -	26,735	95
3.	Lease Rentals		Sch. 2, Col.K, Line 14	-	-	18
4.	Geophysical Expenses		Sch. 2, Col.K, Line 15	-	-	13
5.	Lease Equipment and We[illegible] Costs		Sch. 2, Col.K, Line 16	2,232,828	7,237,783	6,07
6.	Lifting and Workover Costs		Sch. 2, Col.K, Line 17	621,738	5,124,488	
7.	Total Past and Prospective Costs		Sch. 2, Col.K, Line 18	2,854,566	12,389,006	7,34
8.	Deduct: Work in Progress and Cost of Undeveloped Properties at December 31, 1961		Sch. 2, Col.K, Line 19	-	(238,681)	(70
9.	Total Costs Applicable to Developed Properties		Sch. 2, Col.K, Line 20	$ 2,854,566	12,150,325	6,63
10.	Costs Allocated on Basis of BTU's:					
11.	Total Costs Applicable to Developed Properties			$ 2,854,566	12,150,325	6,63
12.	Allocation of Non Productive Costs:					
13.	From Non Productive to Liquids	29.79%	Sch. 5, Col.I, Line 3	-	-	(1,97
14.	From Non Productive to Natural Gas	70.21%	Sch. 5, Col.I, Line 2	-	-	(4,66
15.	Allocation of Productive Costs:					
16.	From Oil only to Liquids	100.00%	Sch. 5, Col.C, Line 3	(2,854,566)	-	
17.	From Joint Products to Liquids	27.11%	Sch. 5, Col.F, Line 3	-	(3,293,953)	
18.	From Joint Products to Natural Gas	72.89%	Sch. 5, Col.F, Line 2	-	(8,856,372)	
19.	Total Allocated Cost of Products			$ -	-	
20.	Costs Allocated on Basis of Revenues:					
21.	Total Costs Applicable to Developed Properties			$ 2,854,566	12,150,325	6,63
22.	Allocation of Non Productive Costs:					
23.	From Non Productive to Liquids	50.07%	Sch. 5, Col.I, Line 7	-	-	(3,3
24.	From Non Productive to Natural Gas	49.93%	Sch. 5, Col.I, Line 6	-	-	(3,3
25.	Allocation of Productive Costs:					
26.	From Oil Only to Liquids	100.00%	Sch. 5, Col.C, Line 7	(2,854,566)	-	
27.	From Joint Products to Liquids	46.73%	Sch. 5, Col.F, Line 7	-	(5,677,847)	
28.	From Joint Products to Natural Gas	53.27%	Sch. 5, Col.F, Line 6	-	(6,472,478)	
29.	Total Allocated Cost of Products			$ -	-	

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Schedule 4
Exhibit ____
Jack W. McNutt
Docket Nos. G-17342 &
G-17343

OCEAN DRILLING & EXPLORATION COMPANY
Computation of Allocated Cost of Products
Based on Lease Classification

(A) Reference	(B) Lease Classifications Oil Only	(C) Lease Classifications Joint Products	(D) Non Productive	(E) Total	(F) Allocated Cost of Products Natural Gas	(G) Allocated Cost of Products Liquids
Col.K, Line 13	$ -	26,735	950,496	977,231		
Col.K, Line 14	-	-	186,402	186,402		
Col.K, Line 15	-	-	132,763	132,763		
Col.K, Line 16	2,232,828	7,237,783	6,074,555	15,545,166		
Col.K, Line 17	621,738	5,124,488	-	5,746,226		
Col.K, Line 18	2,854,566	12,389,006	7,344,216	22,587,788		
Col.K, Line 19	-	(238,681)	(704,983)	(943,664)		
Col.K, Line 20	$ 2,854,566	12,150,325	6,639,233	21,644,124	-	-
	$ 2,854,566	12,150,325	6,639,233	21,644,124	-	-
Col.I, Line 3	-	-	(1,977,828)	-	-	1,977,828
Col.I, Line 2	-	-	(4,661,405)	-	4,661,405	-
Col.C, Line 3	(2,854,566)	-	-	-	-	2,854,566
Col.F, Line 3	-	(3,293,953)	-	-	-	3,293,953
Col.F, Line 2	-	(8,856,372)	-	-	8,856,372	-
	$ -	-	-	21,644,124	13,517,777	8,126,347
	$ 2,854,566	12,150,325	6,639,233	21,644,124	-	-
Col.I, Line 7	-	-	(3,324,264)	-	-	3,324,264
Col.I, Line 6	-	-	(3,314,969)	-	3,314,969	-
Col.C, Line 7	(2,854,566)	-	-	-	-	2,854,566
Col.F, Line 7	-	(5,677,847)	-	-	-	5,677,847
Col.F, Line 6	-	(6,472,478)	-	-	6,472,478	-
	$ -	-	-	21,644,124	9,787,447	11,856,677

OCEAN DRILLING & EXPLORATION COMPANY
Computation of Allocation Factors

ine o.	Description	(A) Lease Classifications: Oil Only — Total Saleable Reserves MM BTU's	(B) Lease Classifications: Oil Only — Total Saleable Reserves Revenues	(C) Lease Classifications: Oil Only — Ratio %	(D) Lease Classifications: Joi — Total Saleabl MM BTU's
.	Computation of BTU Allocation Factors:				
.	Natural Gas	-		- %	43,632,000
.	Liquids	2,290,000		100.00	16,226,200
.	Totals	2,290,000		100.00%	59,858,200
.	Computation of Revenue Allocation Factors:				
.	Natural Gas		$ -	- %	
.	Liquids		1,113,130	100.00	
.	Totals		$ 1,113,130	100.00%	

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Schedule 5
Exhibit _____
Jack W. McNutt
Docket Nos. G-17342 &
G-17343

OCEAN DRILLING & EXPLORATION COMPANY
Computation of Allocation Factors

(A)	(B)	(C)	(D)	(E)	(F)	(G)	(H)	(I)
Lease Classifications								
Oil Only			Joint Products			Totals		
l Saleable Reserves		Ratio	Total Saleable Reserves		Ratio	Total Saleable Reserves		Ratio
BTU's	Revenues	%	MM BTU's	Revenues	%	MM BTU's	Revenues	%
-		- %	43,632,000		72.89%	43,632,000		70.21%
90,000		100.00	16,226,200		27.11	18,516,200		29.79
90,000		100.00%	59,858,200		100.00%	62,148,200		100.00%
	$ -	- %		$ 8,869,884	53.27%		$ 8,869,884	49.93%
	1,113,130	100.00		7,780,358	46.73		8,893,488	50.07
	$ 1,113,130	100.00%		$16,650,242	100.00%		$17,763,372	100.00%

2352

Hearing Exhibit No. X-75

PREPARED TESTIMONY
OF
W. E. STRAIN

1-Q. Please state your name, address, and occupation. A. My name is W. E. Strain. My business address is care of The Superior Oil Company, P. O. Box 1521, Houston 1, Texas. I am employed by The Superior Oil Company as a geophysicist.

• • • • • • • • • • •

2373

36-Q. Is it possible for you to quantify the increase Superior has experienced in the cost of its seismic exploration during the years 1955 and 1959? A. Not exactly. Referring back to Exhibit No. ..... (WES #1), however, I see that direct cost of land crew operations increased about 40% during this period, similar costs of marsh operations increased about 50%, and probably water operations increased at about the same rate as the increase in the one year from 1955 to 1956 was 11%. Thus, all in all, direct field costs appear to have increased from 40 to 50% per day. The amount of work that a crew can do in a day because of the intensified search is reduced to ⅓ or ¼ of what it used to be able to do. Considering these figures, it seems to me that on a per-acre basis the average costs have increased between two and three times, although I could not at this time supply a per-acre dollar cost.

2381

Hearing Exhibit No. X-76

PREPARED TESTIMONY
OF
C. A. NOBLE

1-Q. Please state your name, address, and present employment. A. My name is C. A. Noble. My address is care of The Superior Oil Company, P.O. Box 1521, Houston 1, Texas. I am presently Manager of the Land Department, Mid-Continent Division, of The Superior Oil Company.

• • • • • • • • • • •

2388

11-Q. What does Sheet No. 1 of your exhibit show? A. It shows that Superior's average bonus costs per acre in South Louisiana during the period from 1955 through 1959 were more than four times the average cost per acre during the prior period of 1950 through 1954.

• • • • • • • • • • •

Based on comparable volumes of acreage, the average bonus cost per acre in South Louisiana has gone up from $6.12 during the 1950-1954 period

2389

to $25.66 per acre during the 1955-1959 period.

• • • • • • • • • • •

12-Q. Does the increase in average bonus paid per acre represent the only additional lease expense that The Superior Oil Company has experienced during the period mentioned? A. No. The average royalty burden on productive acreage in South Louisiana and the Texas Gulf Coast and Southwest Texas has also been increasing during the period 1950-1959.

• • • • • • • • • • •

2390

It will be observed that the percentage of acres carrying royalty of only 1/8th, as related to the total number of productive acres, is constantly decreasing, having dwindled from approximately 70% in 1949 to barely over 50% in 1959.

2397

Hearing Exhibit No. X-77

PREPARED TESTIMONY
OF
DON W. PRESCOTT

1-Q. Will you please state your name and address? A. Don W. Prescott, care of The Superior Oil Company, P. O. Box 1521, Houston, Texas.

2-Q. By whom are you employed and in what capacity? A. The Superior Oil Company as Chief Analytical Research Engineer.

• • • • • • • • • • •

2416

36-Q. What conclusions do you draw from the data shown on your Chart No. 17.1?

• • • • • • • • • • •

2417

For each drilling dollar spent, including dry holes, the BTU's of reserve added dropped from 25.6 million in 1951 to 12.5 million in 1960.

• • • • • • • • • • •

2487

Hearing Exhibit No. X-79

PREPARED TESTIMONY
OF
JAMES L. NORMAN

1-Q. Will you please state your name, address, and occupation. A. My name is James L. Norman. By business address is in care of The Superior Oil Company, P. O. Box 1521, Houston 1, Texas. I am an employee of The Superior Oil Company as manager of its Manufacturing and Sales Department.

• • • • • • • • • • •

2489

13-Q. Based upon your Exhibit, what was the weighted average contract price received by The Superior Oil Company for all of its gas reserves added during this period?

2490

A. The price was 19.3¢ per MCF for all of such gas reserves added during the fiscal period 1955 through 1959.

• • • • • • • • • • •

2491

A. Yes, I included all of our intrastate gas sales as well as all interstate gas sales. It will be particularly noted that the average contract price for California gas reserves added as shown in Column C was 26.3c per MCF as of January 1, 1960. All of these contracts are for intrastate sales.

• • • • • • • • • • •

2496

37-Q. Now referring for the moment back to your Exhibit Nos. 1 and 2, were the prices in any of the contracts thereinvolved determined by you on the basis of the costs of find-

ing and producing the gas involved in those sales? A. No, not in a single instance. First, we did not have a definite knowledge of the particular costs involved; and second, in every instance those contract prices were arrived at by negotiating with the purchaser for the most favorable arrangement to Superior that could be obtained.

2500

Hearing Exhibit No. X-80

PREPARED TESTIMONY OF PAT F. TIMMONS

1-Q. Please state your name, address and occupation. A. My name is Pat F. Timmons. My business address is 777 San Jacinto Building, Houston, Texas. I am an Attorney-at-Law. I am also a Certified Public Accountant, and I practice alone, for my own account.

. . . . . .

2501

A. My testimony has the two-fold purpose of verifying the accuracy of the Superior financial data used by Mr. Roger Conkling in the preparation of his Exhibit No. ....., which has been prepared and filed in this proceeding, and to sponsor an exhibit I have prepared, which exhibit has as its purpose to show that the minimum price at which the sales of natural gas by The Superior Oil Company here involved should be certificated by the Commission based on a cost approach employing the means of allocation heretofore adopted by the Commission in the *Phillips* and *Catco* proceedings is a price almost identical to the Conkling exhibit, based on the financial requirements of Superior.

2502

6-Q. Are you in agreement with the Commission as to the propriety of the allocation methods used in the Phillips and Catco cases? A. No, sir, I am not. Without burdening the

(2502)

record with my detailed objections to either or both of these methods, I have used them in my exhibit solely to illustrate that even by the Commission's own theory, the proper initial price for the sales subject to this litigation is 24.34¢ per MCF plus severance taxes on this cost justified basis.

• • • • • • • • • •

2506

14-Q. What rate of return did you use in your exhibit? A. I used 11%.

• • • • • • • • • •

2511

A. I am in this instance attempting to follow the Commission's opinion in Phillips and the reasoning of the Commission as stated in this case.

• • • • • • • • • •

2513

29-Q. What, then, is the total cost to Superior of finding, developing and producing this gas? A. 24.343¢ per MCF.

2518

Hearing Exhibit No. X-81

TESTIMONY OF ROGER L. CONKLING

1-Q. Please state your name, address and occupation. A. My name is Roger L. Conkling. My business address is 811 S. W. 6th Avenue, Portland 4, Oregon. I am an independent consultant.

• • • • • • • • • •

2522

10-Q. What approach have you followed in making this determination? A. I have applied the method used by the

Federal Government in setting rates for electric power generated and transmitted by Federal agencies. This method is designed to produce and does produce the lowest initial rates consistent with sound business principles, and therefore yields results which can properly be considered "minimum".

2523

11-Q. What branches of the Federal Government have used or accept your proposed method? A. The method has been accepted by the Congress of the United States, the Comptroller General of the United States, and the Federal Power Commission itself, in rate development on the basis of financial requirements.

12-Q. Please describe this method and its objective. A. The objective of the method as applied to Governmental projects is to determine the annual costs of the project. Such annual costs are equivalent to the annual revenue requirements of the project, and rates are set so as to meet such revenue requirements.

• • • • • • • • • • •

2527

23-Q. What is the minimum average gas price for Superior as indicated by your application of the Federal Government's method of establishing revenue requirements and rates? A. As shown on Schedule 1 of my exhibit, that price is 24.14¢ per MCF. This price is exclusive of state gas severance taxes, and whatever those taxes are in the various states of sale, they should be added to the price per MCF of gas.

2528

24-Q. How does this price compare with Superior's average price as received in 1959? A. This is shown on Schedule 8. The financial requirement price exceeds Su-

perior's contract prices on a weighted average basis and also exceeds the initial prices provided by contract in the sales here involved which are: (1) Sale to United Gas Pipe Line Company from the Bayou Penchant, Four Isle Dome, and Palmetto Bayou Fields onshore Louisiana, at 21.5¢ per MCF at 15.025 p.s.i.a., plus applicable tax reimbursement of 2.3¢ per MCF; and (2) sale to Transcontinental Gas Pipe Line Corporation from offshore Blocks 71 and 76, Vermilion Area, Louisiana, at 21.4¢ per MCF at 15.025 p.s.i.a., as to which there is no tax reimbursement presently applicable.

• • • • • • • • • • •

2534

The per-MCF revenue requirement from gas is that price which will amortize the entire investment, at the indicated rate of return, during the period over which the reserves will be exhausted. This must be calculated, since it will vary with the facts in each case. The calculation is made by finding the exact price at which annual revenues and annual costs are in balance. For Superior, this gas price is 24.14¢ per MCF.

• • • • • • • • • • •

2535

35-Q. Please explain Schedule 7. A. Column 1 shows the total annual revenue which will be received from sale of oil, gas and liquids shown on Schedule 4, at the produce prices shown on Schedule 6, and at the calculated gas price of 24.14¢ per MCF exclusive of any tax reimbursement.

• • • • • • • • • • •

2557

Hearing Exhibit No. 81 (Excerpt)

SCHEDULE 8

THE SUPERIOR OIL COMPANY

REQUIRED MINIMUM AVERAGE PRICE FOR GAS AND ACTUAL PRICE COMPARED

	Price for MCF Before Gas Severance Tax
Minimum Average Price for Gas To Meet The Financial Requirements Of The Superior Oil Company FY 1955-1959 Operations	24.14¢
Weighted Average Contract Price as of 8/31/59 For Gas Sales Based in Whole or in Part on Reserves Found in FY 1955-59	19.5¢

Prices Of The Superior Oil Company At Issue in Docket No. G-13169 et al:

Purchaser	Field	Price
United Gas PipeLine Company	Four Isle Dome	21.5¢ (1) (2)
" " " "	Bayou Penchant	21.5¢ (1) (2)
" " " "	Palmetto	21.5¢ (1) (2)
Transcontinental Gas Pipeline Company	Vermilion Blk. 71-76	21.4¢ (1) (2)

(1) Included in Average Price Actually Received, As Indicated Above

(2) Exclusive Of Applicable Tax Reimbursement In The Amount Of Per MCF

2662

(Received Nov. 20, 1959)

BEFORE THE
FEDERAL POWER COMMISSION

Docket No. G-16,556

IN THE MATTER OF
UNITED GAS PIPE LINE COMPANY

Affidavit

STATE OF LOUISIANA
PARISH OF CADDO

Personally came and appeared before me the undersigned qualified and acting Notary Public in and for said Parish and State, M. V. COUSINS, a resident of Caddo Parish, Louisiana, who being by me duly sworn first, deposes and says:

1. That he is a duly qualified and acting Vice President of United Gas Pipe Line Company, Applicant in the above entitled and numbered cause, and that for and on behalf of said Applicant, he makes this Affidavit in compliance with Order issued by the Federal Power Commission under date of August 10, 1959 modifying and adopting the Trial Examiner's Decision; and

2. That the facilities authorized in the above and numbered

2663

cause were completed and placed in service on November 11, 1959.

M. V. COUSINS
Vice President

SWORN TO AND SUBSCRIBED before me on this the 19th day of November, 1959.

(SEAL)

RAI S. MELTON
Notary Public in and for
Caddo Parish, Louisiana

2668

(Received Apr. 11, 1960)

BEFORE THE
FEDERAL POWER COMMISSION

Docket No. G-17340

IN THE MATTER OF
CALLERY PROPERTIES, INC., ET AL.

Motion to Amend Certificate of Public Convenience and Necessity

Comes now Callery Properties, Inc. ("Callery") and hereby moves to amend its Certificate of Public Convenience and Necessity which was issued by the Commission in Docket No. G-17340 to incorporate in and add to the gas sales contract other oil and gas leases. There is attached hereto an Agreement dated November 2, 1959, which dedicated new leases lying within the area to that certain contract between Callery Properties, Inc., et al, as Seller, and Hope Natural Gas Company, as Buyer, dated December 10, 1958.

Sincerely yours,

CALLERY PROPERTIES, INC.
JOHN W. MARTIN
Vice-President

(3000)

3000

(Docketed Jan. 13, 1961)

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Jerome K. Kuykendall, Chairman; Frederick Stueck, Arthur Kline and Paul A. Sweeney.

Docket Nos. G-7053, G-7054, G-7056, G-7057, G-7060, G-7061, G-7062, G-7063, G-7064, G-7065, G-7066, G-7067, G-7069, G-7070, G-7071, G-7392, G-8438, G-8570, G-9482, G-9487, G-11213, G-11970, G-12425, G-12717, G-13169 and G-15242

SEABOARD OIL COMPANY, NOW TEXACO SEABOARD, INC.

TEXACO SEABOARD INC.

Order Amending Certificates of Public Convenience and Necessity by Substitution of Parties Dismissing Application in Part and Cancelling Docket Number

(Issued January 13, 1961)

Texaco Seaboard Inc. (Texaco) filed an application on June 6, 1958, in Docket No. G-15242, for a certificate of public convenience and necessity authorizing it to continue the services previously rendered by Seaboard Oil Company (Seaboard) under certificate authority heretofore granted in the above entitled proceedings. The application in Docket No. G-15242 states that by instrument of conveyance dated and effective June 1, 1958, Texaco acquired all properties, rights and obligations of Seaboard covered by the certificate authorization referred to above.

In addition to the authorization described above, Texaco requests authority to continue the service heretofore authorized in Docket Nos. G-7072 and G-9240.

The certificate authorization issued to Seaboard in Docket No. G-7072 has been vacated and the related rate schedule has been rejected by letter dated May 15, 1959, pursuant to Section 154.91 (d) of the Commission's regulations.

3001

On May 28, 1959, Texaco filed, pursuant to Section 7 (b) of the Act, an application in Docket No. G-18657 for authorization to abandon the service previously certificated in Docket No. G-9240. Said application states that production ceased in 1958.

The application in Docket No. G-15242 is being disposed of herein as a motion to amend the certificates heretofore issued to Seaboard by substituting Texaco as holder of said certificates and will hereinafter be treated as such.

The Commission finds:

(1) It is necessary and appropriate in carrying out the provisions of the Natural Gas Act, and the public convenience and necessity require, that the certificates of public convenience and necessity heretofore issued to Seaboard as indicated above be amended by substituting the name of Texaco as holder of said certificates.

(2) That portion of the application in Docket No. G-15242 relating to service heretofore authorized in Docket Nos. G-7072 and G-9240 should be dismissed.

(3) In view of the above Docket No. G-15242 should be cancelled.

The Commission orders:

(A) The certificates of public convenience and necessity heretofore issued in Docket Nos. G-7053, G-7054, G-7056, G-7057, G-7060, G-7061, G-7062, G-7063, G-7064, G-7065, G-7066, G-7067, G-7069, G-7070, G-7071, G-7392, G-8438,

G-8570, G-9482, G-9487, G-11213, G-11970, G-12425, G-12717, and G-13169 are amended by substituting the name of Texaco for that of Seaboard as holder of said certificates.

(B) In all other respects said certificates shall remain in full force and effect.

(C) That portion of the motion herein relating to service authorized in Docket Nos. G-7072 and G-9240 is dismissed.

(D) Docket No. G-15242 is cancelled.

By the Commission.

JOSEPH H. GUTRIDE,
(SEAL) *Secretary.*

3025

(Docketed Apr. 14, 1961)

BEFORE THE
FEDERAL POWER COMMISSION

Docket No. G-17340

IN THE MATTER OF
CALLERY PROPERTIES, INC., ET AL.

Motion to Amend Certificate of Public Convenience and Necessity

Comes now Callery Properties, Inc. ("Callery") and hereby moves to amend its Certificate of Public Convenience and Necessity which was issued by the Commission in Docket No. G-17340 to incorporate in and add to the gas sales contract another oil and gas lease. There is attached hereto an Agreement dated February 22, 1961, which dedicated the new lease lying within the area to that certain contract between Callery Properties, Inc., et al, as Seller,

and Hope Natural Gas Company, as Buyer, dated December 10, 1958.

Sincerely yours,

CALLERY PROPERTIES, INC.
JOHN W. MARTIN
Vice-President

3034

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 16692

THE UNITED GAS IMPROVEMENT COMPANY, *Petitioner,*

v.

FEDERAL POWER COMMISSION, *Respondent.*

Decree

On Petition to Review an Order of the Federal Power Commission

THIS CAUSE came on to be heard on the Transcript of the Record from the Federal Power Commission and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the order of the said Federal Power Commission in this Cause be, and hereby is vacated, and that this cause be, and hereby is remanded to the Federal Power Commission for further proceedings consistent with the opinion of this Court.

Filed and entered October 31, 1960

FRANK H. SCHMID, *Clerk.*

3047

(Docketed May 10, 1961)

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Jerome K. Kuykendall, Chairman; Frederick Stueck and Arthur Kline

Docket No. AR61-2

AREA RATE PROCEEDING [1]

Docket Nos. CI61-1564, *et al.*

ALADDIN EXPLORATION COMPANY, INC., *et al.*[2]

Docket Nos. RI60-18, *et al.*

AMERADA PETROLEUM CORPORATION, *et al.*[3]

Order Instituting Rate Proceeding for the Southern Louisiana Area, Consolidating Proceedings and Prescribing Preliminary Procedure

(Issued May 10, 1961)

On September 28, 1960, the Federal Power Commission issued its Statement of General Policy No. 61-1 based upon the Commission's experience gained after six years of regulation of independent producers under the Natural Gas Act. By this Statement and the area schedules set forth therein the Commission has announced standards for both initial and increased area price levels for natural gas sold or to be sold in interstate commerce by producers. On Oc-

[1] For listing of all persons hereinafter made respondents in such proceeding see Appendix "A" hereto.

[2] For listing of certificate proceedings consolidated herein see Appendix "B" hereto.

[3] For listing of rate suspension proceedings consolidated herein see Appendix "C" hereto.

tober 25, 1960, the Commission issued the First Amendment to Policy Statement 61-1 announcing *inter alia* an initial price level for the Southern Louisiana area.

Since that date, four courts of appeal have also had occasion to interpret the Supreme Court's construction [4] of the certificate provisions of Section 7 of the Natural Gas Act.[5] As we observed in our

Statement of General Policy No. 61-1, the price levels there announced are subject to revision from time to time as experience and evidence might dictate.

On December 23, 1960, we instituted the first area rate hearing to determine just and reasonable rates in what we termed the Permian Basin Area. Now, because of the importance of the Southern Louisiana area as a source of present and future gas supply, and because of the unusually large number of pending proceedings relating to that area, we have decided to initiate a hearing to determine the initial produced area rate or rates required by the public convenience and necessity and the just and reasonable area rate, or rates, for or within the geographical area hereinafter described.

This area rate proceeding will be concerned with the geographical area consisting of that portion of the State of Louisiana lying south of the 31° parallel and including all

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[4] *Atlantic Refining Co.* v. *Public Service Commission*, 360 U.S. 378.

[5] *United Gas Improvement Co.* v. *F.P.C.*, 283 F. 2d 817 (CA 9), *certiorari* denied April 17, 1961; *Public Service Commission* v. *F.P.C.*, 287 F. 2d 146 (CADC), *certiorari* denied April 17, 1961; *United Gas Improvement Co.* v. *F.P.C.*, 287 F. 2d 159 (CA 10); *United Gas Improvement Co.* v. *F.P.C.*, Nos. 18112, 18113 (CA 5), decided February 22, 1961; *Texaco Inc.* v. *F.P.C.*, Nos. 18349, *et al.*, (CA 5), decided April 14, 1961.

areas, both State and Federal, in the Gulf of Mexico off the shore of Louisiana. In view of the urgency of determining rates for this area, we have concluded that no useful purpose would be served at this time by entertaining issues or considering contentions that the areas we have delineated in our Statement might be inappropriate for rate making purposes. Accordingly, for the purposes of this area proceeding we do not propose to consider any evidence looking toward the fixing of rates for sales of gas produced in areas outside the boundaries of the geographical area we have delineated. Nothing we have said, however, prejudges any proposal which may be made that we determine more than one rate within this area.

Certificate proceedings are pending, involving the question of the appropriate initial rates applicable to sales of natural gas within the area. These proceedings are designated in Appendix "B" hereof. In the proceedings listed in Appendix "C" hereof, the Commission has heretofore issued its orders suspending proposed increases in rates and charges for sales of natural gas for resale in interstate commerce within the geographical area above described. The natural gas producers in these docketed proceedings, and other producers in the geographical area, may also be charging and collecting rates which, although not under suspension by the Commission presently, may be unjust, unreasonable, unduly discriminatory or preferential under the Natural Gas Act. The interests not only of the producers but of the pipeline companies purchasing gas produced in the area, interested distributing companies, other parties having an interest, and the ultimate consumers for whose protection the Natural Gas Act was enacted, would be best served, and our responsibility under the statue more fully discharged, if all such proceedings were consolidated for hearing purposes with the area rate proceeding herein initiated.

We contemplate the issuance of an interim order determining an appropriate initial rate, or rates, for new service in this area. To that end we shall prescribe that in the first phase of this hearing evidence be adduced which bears on the rate, or rates, at which the present or future public convenience and necessity requires that new service be initiated. In so doing we do not depart from our position regarding eventual elimination of the two pricing standards. But the urgent need for determining an unusually large number of certificate applications relating to this area calls for the fixing, at the earliest possible time, of an initial rate, or rates, on an interim basis, so as to afford a measure of certainty and stability to prices and producer revenues while we determine a just and reasonable rate, or rates, for this area.

Because of the large number of persons having interests which may be affected by the determinations contemplated by this order and the consequent procedural impracticability of permitting unlimited individual participation of all such persons, and in order to expedite the hearing, it is appropriate in the public interest that there be established reasonable limitations upon the number of persons individually participating in the proceeding, the number of attorneys who will be permitted to examine or cross-examine witnesses or otherwise participate in the formal hearings as is contemplated by the Commission's Rules of Practice and Procedure, and the number of witnesses that may be heard upon any issue raised in such proceeding.

The interest of all parties and the public will also be served by providing for a prehearing conference as contemplated by the Commission's Rules of Practice and Procedure for effectuation of the purposes specifically mentioned in Section 1.18 of such rules. Attention is directed

to the Commission's view with respect to the use of the conference technique and the ultimate objective of expediting the Commission's hearing proceedings as set forth in Order No. 217. Such prehearing conference shall be confined to considering the first, or certificate phase of this proceeding. Among other things, its objective shall be to facilitate consolidation of evidentiary showings, to consider the type of evidence to be adduced, the order of presentation, the simplification and delineation of the issues, and the number of witnesses to be heard on any issue or subject. The right to participate in such a conference is predicated upon the filing in accordance with the provisions of Paragraph "E" of this order of a statement setting out specifically the interests in the proceeding by the person or persons seeking an opportunity to participate therein and the orders of the Commission or the rulings of the Presiding Examiner with respect thereto. Upon completion of the prehearing conference, the Presiding Examiner shall prepare and file with the Secretary of the Commission a summary report of such conference.

3050

The Commission finds:

(1) To aid in carrying out its authority and responsibility under the Natural Gas Act, it is necessary and proper that the Commission on its own motion institute a proceeding to determine the rate, or rates, at which the public convenience and necessity requires, and a just and reasonable rate, or rates, for sales of natural gas within the geographical area consisting of that portion of the State of Louisiana lying south of the 31° parallel and including all areas, both State and Federal, in the Gulf of Mexico off the shore of Louisiana, and that a public hearing be held at a time and place to be designated by order of the Commission.

(2) Good cause exists to consolidate for the purposes of hearing all of the proceedings designated in Appendices "B" and "C" hereto with the rate proceeding contemplated in Finding (1) above and hereafter instituted.

(3) Prior to the subject hearing to be held as contemplated in Finding (1) above, a prehearing conference should be held on June 26, 1961, for the purposes set forth herein and in Section 1.18 of the Commission's Rules of Practice and Procedure, as amended.

Pursuant to the Provisions of the Natural Gas Act, particularly Sections 4, 5, 7, 10, 14, 15 and 16 thereof,

The Commission orders:

(A) A proceeding is hereby instituted to determine the initial rate, or rates, at which the public convenience and necessity requires and the just and reasonable rate, or rates, for the sales of natural gas produced in the geographical area specifically designated in Finding (1) above, subject to the jurisdiction of the Commission, and a public hearing shall be held in such proceeding at a time and place hereafter to be ordered by the Commission. All persons named in Appendix "A" hereto and all parties on whose behalf such persons have filed FPC gas rate schedules for sales in such area are hereby made respondents in such proceeding.

(B) The proceeding hereinbefore instituted shall also encompass the investigation of facts, conditions, practices, or matters relating to the sale of natural gas produced in said geographical area to aid in the enforcement of the provisions of the Act or in prescribing rules and regulations thereunder, and shall also encompass issues as to whether any rate or charge demanded, observed, charged or collected by any natural gas company in connection with

such sales is unjust, unreasonable, unduly discriminatory or preferential.

3051

(C) The pending proceedings designated in Appendices "B" and "C" be and they are hereby consolidated for the purposes of hearing with the proceeding instituted in Paragraph (A) above.

(D) A prehearing conference be held pursuant to the Commission's Rules of Practice and Procedure, particularly Section 1.18 thereof at 10:00 a.m. C.S.T., on June 26, 1961, in a hearing room of the Federal Power Commission, located in the Capitol House, 201 Lafayette Street, Baton Rouge, Louisiana, for the purpose specifically set forth in said section of such Rules and to afford all interested persons an opportunity to be heard with respect to the procedures to be followed in expeditiously determining the issues to be tried in the formal area rate hearing herein ordered. The prehearing conference shall be limited to issues regarding determination of the rate or rates required by the public convenience and necessity, for initial sales in this area. The conference proceedings shall be recorded by a reporter, and shall be recessed and reconvened at the discretion of the Presiding Examiner. Upon completion of the conference, the Presiding Examiner shall prepare and file with the Secretary of the Commission his report of the conference, summarizing therein the issues, procedures and other matters considered during such conference and making such recommendations with respect thereto as he may deem appropriate.

(E) Any person desiring to participate in the prehearing conference to be held in accordance with Paragraph (D) shall, on or before June 1, 1961, file with the Secretary of the Commission an original and 3 conformed copies of

a statement of position, which shall include, but not be limited to, a summarization of the following data:

(i) His interest in and claimed right to be heard in one or more of these consolidated proceedings.

(ii) The extent to which he desires to participate in the hearings, i.e., a statement of position, presentation of evidence, if any, specific evidence to be presented, number of witnesses, etc.

(iii) His representation, whether as an individual or as a representative for an association, group or segment of the natural gas industry, or of ultimate consumers.

(F) Any person, other than the applicants and respondents specifically named in Appendices "A", "B" and "C", who desires to participate as an intervener in the area rate hearing hereinabove ordered to be held shall, on or before June 1, 1961, file a notice of intervention or a petition to intervene with the Secretary of the Commission setting forth therein the basis claimed for the right to intervene in such proceeding. On or

before June 13, 1961, the Secretary of the Commission shall advise all participants in these consolidated proceedings of the names of all persons who have filed notices of intervention or petitions for leave to intervene herein.

(G) A copy of this order shall be published in the Federal Register and served upon each of the respondents set out in Appendix "A", who according to the records of this Commission has a rate schedule on file for the sale of gas within the above described area; upon each of the applicants set out in Appendix "B"; and upon all purchasers of natural gas sold subject to the Commission's jurisdiction in the said area and upon interested State commis-

sions as is provided for in Section 1.19 of the Commission's Rules of Practice and Procedure.

(H) Edward B. Marsh, a duly qualified and appointed (as provided by Section 11 of the Administrative Procedure Act) hearing examiner, or his successor legally qualified, appointed and designated, is designated to preside at the hearing herein instituted including the prehearing conference hereinbefore ordered and is authorized and directed, in so doing, to exercise all of the functions and authority prescribed by the Administrative Procedure Act and this Commission's Rules of Practice and Procedure.

By the Commission.

(SEAL)

JOSEPH H. GUTRIDE,
Secretary.

3086

(Docketed June 5, 1961)

Docket No. G-16388
The Superior Oil Company

AIRMAIL June 5, 1961

The Superior Oil Company
P. O. Box 1521
Houston 1, Texas

Attention: H. W. Varner, Attorney

Gentlemen:

Temporary authorization is hereby issued to The Superior Oil Company in Docket No. G-16388 pursuant to your request filed May 17, 1961, subsequent to the issuance of the court mandate in *The United Gas Improvement Company* v. *Federal Power Commission,* No. 16,692 (USCA, 9th).

The rates charged for this service shall be subject to such conditions, if any, as the Commission shall lawfully prescribe in issuing a permanent certificate of public convenience and necessity in Docket No. G-16388, including any provision for refund imposed thereunder.

This is without prejudice to such final disposition of the application for certificate as the record may require.

By direction of the Commission.

J. H. GUTRIDE
Secretary

cc: United Gas Pipe Line Company
1525 Fairfield Avenue
Shreveport, Louisiana

RGC
LD'A: lhk
5/24/61

Approved by the Commission.

C. J.
Secretary's Office

3376

(Docketed July 10, 1961)

GOVT PD FED POWER COMM

F. J. Jones, Jr., Vice President, The Superior Oil Company, 400 Oil and Gas Building, Houston, Texas

Discontinuance of sale and delivery of gas to Transcontinental Gas Pipe Line Corporation as stated in filing of July 3, 1961 in Docket No. G-16380 has not been authorized by Commission as required by Section 7 (b) of Natural Gas

(3076)

Act. Deliveries should be immediately resumed. By direction of the Commission.

J. H. Gutride Secretary FEDERAL POWER COMMISSION

RGC:OWN:lhk G-16380 THE SUPERIOR OIL COMPANY
7/5/61

cc: Files
Mr. Nelson
O.G.C. (2)

3376A

(Received July 11, 1961)

NS HSA011 PD FAX HOUSTON TEX 11 908A CST

FEDERAL POWER COMM
441 G ST NORTHWEST WASHDC

ATTENTION J H GUTRIDE, SECRETARY

YOUR TELEGRAM OF JULY 10 RE DOCKET G-16380 IS DEEMED SUFFICIENT TO GRANT THE AUTHORITY REQUESTED IN OUR FILING OF JULY 3 STOP GAS DELIVERIES TO TRANSCONTINENTAL GAS PIPE LINE CORP. FROM OFFSHORE BLOCK 71, VERMILION AREA, LA WILL BE RESUMED STOP WE RESERVE RIGHTS STATED IN OUR JULY 3RD FILING AND ACTION OF RESUMPTION OF DELIVERIES SHALL NOT BE DEEMED IN PREJUDICE THEREOF

THE SUPERIOR OIL CO CC H W VARNER ATTY

3378

(Docketed July 12, 1961)

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1960

No. 18,113

THE UNITED GAS IMPROVEMENT COMPANY, *Petitioner,*

versus

FEDERAL POWER COMMISSION, *Respondent.*

Petition for Review of an Order of the Federal Power Commission.

Before Tuttle, Chief Judge, and Brown and Wisdom, Circuit Judge.

Judgment

This cause came on to be heard on the petition of The United Gas Improvement Company for review of an order of the Federal Power Commission issued on August 10, 1959 in Docket Nos. G-16,380 and G-16,387, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered, adjudged and decreed by this Court that the order of the Commission in this cause be, and the same is hereby, vacated; and that this cause be, and it is hereby, remanded to the Commission for further appropriate action.

"Brown, Circuit Judge, Dissenting."

February 22, 1961

Issued: July 10, 1961

3640A

Docketd Aug. 2, 1961

Docket No. G-16380
The Superior Oil Company

F. P. Jones, Jr., Vice President
The Superior Oil Company
400 Oil and Gas Building
Houston 2, Texas

Dear Mr. Jones:

The Superior Oil Company is hereby authorized to continue the sale of natural gas, in interstate commerce to Transwestern Gas Pipe Line Corporation, produced from the Offshore Block 71 and 76 Fields, Vermilion Parish, Louisiana as proposed in Docket No. G-16380. This authorization is subject to the condition that the total rate of 21.4¢ per Mcf at 15.025 psia thereunder shall be subject to such conditions as the Commission shall lawfully prescribe in issuing a permanent certificate in Docket No. G-16380, in-including any provision for refund thereby imposed. The above specified rate and the condition attached thereto shall remain in effect until changed by further Commission order in the proceeding, Docket No. G-16380.

By direction of the Commission.

J. H. GUTRIDE
Secretary

cc: James B. Henderson
Vice President and General Counsel
Transcontinental Gas Pipe Line Corporation
3100 Travis Street
Houston, Texas

RGC
OWN/bjm:bjh

3640B

Received Aug. 7, 1961

THE SUPERIOR OIL COMPANY
P. O. Box 1521
Houston 1, Texas

Mr. J. H. Gutride, Secretary
Federal Power Commission
441 G St., N. W.
Washington 25, D. C.

Dear Sir:

In re: Docket No. G-16380
The Superior Oil Company

Your letter of August 2, 1961, addressed to our Vice-President, Mr. F. P. Jones, Jr., in connection with the above matter has been received. It is noted that the authority of this Company to continue sale of natural gas in interstate commerce to Transwestern Gas Pipe Line Corporation as to Offshore Blocks 71 and 76 Fields, Vermilion Parish, Louisiana, is granted. This authorization was neither requested nor desired insofar as Block 76 Field is concerned. As to that field, this Company was authorized by your letter of October 22, 1958, to commence and continue that sale. For this reason the authorization in letter of August 2, 1961, is superfluous and neither accepted nor acted upon as to Block 76.

Insofar as the Block 71 continuation of sale authority is concerned, notwithstanding the apparent grant (requirement?) of authority for continuation of this sale by telegram of July 10, it will be deemed that sale from that block made from and after August 2, 1961 is made pursuant to your letter bearing that date.

(3640B)

It is assumed that the word "Transwestern" in the second line of your letter was intended to be "Transcontinental".

Yours very truly,

THE SUPERIOR OIL COMPANY

H. W. VARNER
Attorney

HWV:lmb
cc—James B. Henderson, Esq., Vice-President & General Counsel,
Transcontinental Gas Pipe Line Corporation,
3100 Travis St., Houston, Texas

3640C

Filed Aug. 16, 1961

Docket No. G-16380
The Superior Oil Company

F. P. Jones, Jr., Vice President
The Superior Oil Company
P.O. Box 1521
Houston 1, Texas

Dear Mr. Jones:

By letter dated August 4, 1961, your Mr. H. W. Varner called attention to the fact that the Commission's letter of August 2, 1961, granted temporary authorization to The Superior Oil Company, Docket No. G-16380, to sell gas to "Transwestern Gas Pipe Line Corporation."

This was an error and should have been "Transcontinental Gas Pipe Line Corporation." Calling our attention to this error is appreciated.

Mr. Varner also states that deliveries from the Block 76 are governed by the temporary authorization issued Oc-

tober 22, 1958, not the temporary authorization issued August 2, 1961.

The order of the Fifth Circuit Court of Appeals vacating this Commission's order issued August 10, 1959, in Docket No. G-16380 covered not only the August 10, 1959 order, but also all previous actions taken in Docket No. G-16380. For this reason, the temporary authoriztion for the continued sales of natural gas to Transcontinental issued August 2, 1961, covers sales from both Offshore Block 71 and Offshore Block 76 Fields.

Very truly yours,

J. H. GUTRIDE
Secretary

cc: James B. Henderson, Esq.
Vice President and General Counsel
Transcontinental Gas Pipe Line Corporation
3100 Travis Street
Houston, Texas

Files
O.G.C.-2
Mr. Nelson
RGC
OWN:ega
8-11-61

3641

(Docketed September 6, 1961)

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL POWER COMMISSION

In the Matters of

J. R. FRANKEL, ET AL.	Docket No. G-4011
R. R. FRANKEL	Docket Nos. G-8125, G-16840
J. R. and R. R. FRANKEL	Docket No. G-13197
BERKSHIRE OIL COMPANY and R. R. FRANKEL	Docket No. G-13224
J. R. FRANKEL	Docket No. G-18391

Motion to Amend Applications for and Certificates of Public Convenience and Necessity

Comes now Berkshire Oil Company (Berkshire) and pursuant to the provisions of the Natural Gas Act, as amended, and the Rules and Regulations of this Commission, particularly Section 1.12 of the Commission's Rules of Practice and Procedure, and moves to amend the applications for and certificates of public convenience and necessity, as supplemented or amended, issued or filed, under each of the proceedings listed above, by deleting therefrom the names, J. R. Frankel, *et al.*, R. R. Frankel, J. R. and R. R. Frankel, Berkshire Oil Company and R. R. Frankel, and J. R. Frankel (collectively called Frankels), respectively, and substituting therein the name Berkshire Oil Company in such manner and to the end that Berkshire shall succeed to and be possessed of all the rights, privileges, obligations, duties and responsibilities heretofore respectively had thereunder by Frankels, just as if the name Berkshire had appeared originally and throughout in each of said proceedings whichever and wherever the names

of Frankels respectively appear therein; and in support said motion shows as

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follows:

I.

1. That M. Frankel & Sons, a partnership, was organized under the laws of Texas on June 5, 1944. The partnership, which had its principal place of business at 840 Mellie Esperson Building, Houston, Texas, was active in the exploration for and development of oil and gas properties. Because of the peculiarities of Louisiana law, the properties owned by the partnership in Louisiana were in the names of the individual partners. Therefore, all filings with the Federal Power Commission have been under the name of one of the individual partners, normally either J. R. Frankel or R. R. Frankel.

2. Berkshire Oil Company is a corporation organized under the laws of the State of Texas, having its principal place of business at 840 Mellie Esperson Building, Houston, Texas. Berkshire Oil Company conducts its business in Louisiana from an office at 420 Oil and Gas Building, New Orleans, Louisiana. R. R. Frankel is the President and J. R. Frankel the Vice President of Berkshire.

3. The stockholders of Berkshire were formerly the partners of Frankel. The partnership has been dissolved and all the properties have been transeferred to Berkshire. The instrument accomplishing this transfer of properties is attached hereto as Exhibit A. Under such transfer, Berkshire has assumed all obligations, contractual or otherwise, of Frankels and, more specifically, will continue deliveries of gas pursuant to the sales contracts heretofore

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executed by Frankels and filed with this Commission. Thus, it can be seen that the deliveries of gas heretofore made

by Frankels under the Natural Gas Act will be continued by Berkshire without cessation or interruption.

II

Simultaneously herewith there is being filed a motion by Berkshire herein requesting that Berkshire be substituted for Frankels in all the dockets involving the FPC Gas Tariffs relating to the sales of gas referred to herein. That filing is incorporated herein by reference.

III

Correspondence in connection with this matter should be addressed to:

H. H. Hillyer, Jr. Esq.
1122 Whitney Building
New Orleans 12, Louisiana

Richard M. Merriman, Esq.
Peyton G. Bowman, III
Reid & Priest
910 17th Street, N.W.
Washington 6, D. C.

Respectfully submitted,

BERKSHIRE OIL COMPANY
By R. R. FRANKEL
R. R. Frankel, *President*

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Docketed Jan. 10, 1962

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Joseph C. Swidler, Chairman; Howard Morgan, L. J. O'Connor, Jr., and Charles R. Ross.

Docket Nos. G-13169 *et al.*
TEXACO-SEABOARD, INC. *et al.*[1]

Docket Nos. G-17336 *et al.*
TEXAS GAS EXPLORATION CO. *et al.*[1]

Docket Nos. G-16540 *et al.*
REPUBLIC NATURAL GAS CO. *et al.*[1]

Order Denying Motions Dismissing Petition and Issuing Notice of Refund Obligations

(Issued January 10, 1962)

In each of the above-captioned dockets we have heretofore issued unconditional permanent certificates of public convenience and necessity under Section 7(c) of the Natural Gas Act. These certificates are still outstanding, but the proceedings are before us again as a result either of judicial remand or our own grant of rehearing, for the purpose of reconsideration, upon applications therefor duly filed under Section 19 (a) of the Act. Each of these proceedings is consolidated for hearing with Docket No. AR61-2.

These dockets fall into three groups:

I. Sales to Transcontinental Gas Pipe Line Corporation (Transco); certificates issued by order accom-

[1] See Appendices I, II and III for complete listing of docket numbers and proceedings.

panying Opinion 315, 20 F.P.C. 264. This order was affirmed by the United States Court of Appeals, for the Third Circuit, *United Gas Improvement Co.* v. *F.P.C.*, 269 F. 2d 865, but remanded by the Supreme Court, *Public Service Commission of New York* v. *F.P.C.*, 361 U.S. 195, with instructions to reconsider and redetermine in the light of *Catco* (*Atlantic Refining Co.* v. *Public Service Commission of New York*, 360 U.S. 378).

II. Sales to Hope Natural Gas Company; certificates issued by order accompanying Opinion 327, 22 F.P.C. 378. This order was "reversed" on appeal "insofar as it grants unconditional certification to the initial price proposals". *Public Service Commission of New York* v. *F.P.C.*, 287 F. 2d 146 (CADC), cert. denied *sub nom.*, *Hope Natural Gas Co.* v. *Public Service Commission of New York*, 365 U.S. 880.

III. Sales to Transco; certificates issued by order of November 17, 1959, 22 F.P.C. 836. We granted rehearing (as to dockets listed in Appendix III only) by order of January 15, 1960, in Docket Nos. G-16603 *et al.* (unreported).

When we first consolidated these various proceedings for hearing with Docket No. AR61-2, we contemplated an early decision on the initial rates proposed in these and other dockets. We have since concluded that such a "two-phase" area proceeding is not feasible at this time and have eliminated the separate "certificate" phase of that proceeding by our order of November 9, 1961. Accordingly, we deem it incumbent upon us once more to consider these proceedings and to determine what further remedies, if any, the public interest necessitates.

It is fundamental in a producer certificate proceeding that the applicant show hisp roposed price "to be in the public interest." *Catco*, 360 U.S. at 390. Certain minimal standards as to price must be met at the outset. The development of these minimal standards has been a continuing process. We reviewed this development in *Socony Mobile Oil Company, Inc.*, Docket No. G-13780, order issued September 25, 1961 (26 F.P.C.):

> • • • Traditionally, we have regarded the test as one that relates the proposed price to the previous price structure in the area. See *Cities Service Gas Co.*, 14 F.P.C. 134, affirmed sub nom. *Signal Oil and Gas Co.* v. *F.P.C.*, 238 F. 2d 711 (CA3), cert. den., 353 U.S. 923. Immediately after the Supreme Court's *Catco* decision we announced a test of comparison with the highest price in the area previously certificated by us; but that standard was judicially upset for failure to show 'a real administrative effort to hold back prices.' *Texas Gas Transmission Corp.*, 22 F.P.C. 378, 388, order set aside sub nom *P.S.C. of N.Y.* v. *F.P.C.*, 287 F. 2d 146, 150 (CADC) cert. den., 365 U.S. 880, 882. • • •

More recently, on October 31, 1961, we issued our Fourth Amendment to our Statement of General Policy No. 61-1 in which, guided by recent court decisions therein cited, and after careful re-examination of the factors set forth in our original Policy Statement 61-1, we lowered the ceiling for initial prices in Southern Louisiana to 21.25¢ per Mcf inclusive of States taxes and 19.5¢ per Mcf for off-shore sales not subject to the taxing jurisdiction of the State. By this statement we confirm for the future what the courts have held in the past: that initial prices at the levels proposed herein are out of line and cannot be approved un-

less justified by compelling evidence after full hearing; such evidence has not been adduced to date.

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While we have power to redetermine these proceedings on the basis of the respective records as originally made and in the light of additional facts of which we may take official notice, we adhere to the view that it would be fairer and wiser in the present circumstances to offer the applicants a further opportunity to adduce evidence in Docket Nos. AR61-2 *et al.* in support of their proposed prices. But the necessary deferral of final resolution of these proceedings requires us to make it explicit that the public will not be without interim protection.

We have concluded, as to all rates collected by the applicants for the sales involved in these proceedings, that we should explicitly impose upon each applicant, to the extent that we are empowered to do so, an obligation to refund any amounts collected in excess of the amounts which would have been collected under the rate or rates finally determined in these proceedings to accord with the requirements of the public convenience and necessity.

We find ample authority under Sections 7, 16 and 19 of the Act so to protect the public interest, pending final disposition of the initial price questions herein. The producer-applicants have no vested rights to receive the benefits of an order issued by the Commission once such order has been remanded to the Commission because its findings could not be supported under existing law. *Securities and Exchange Commission* v. *Chenery Corporation*, et al., 332 U.S. 194; *Federal Communications Commission* v. *Pottsville Broadcasting Company*, 309 U.S. 134, 145. Similarly, applicants have no vested rights under an order as to which we have granted the statutory rehearing.

Recently, in *Socony Mobil Oil Company, Inc.*, Docket No. G-13780, when confronted with the same problem as

is presented here, we set aside the permanent certificate and issued temporary authority properly conditioned. But upon further study of this problem, and particularly of the mandate of the District of Columbia Circuit covering Group II of these proceedings, we are now convinced that we can adequately protect the public by redetermining the price issue in the light of governing legal standards. This makes it unnecessary to set aside the certificates.

On June 13, 1960, Transco, the purchaser in the Group I proceedings filed as to those dockets a motion requesting that we reaffirm our order issuing unconditional certificates. However, in view of our findings as to the insufficiency of the evidence heretofore adduced, this motion must be denied insofar as it requests that we reaffirm our former approval of the proposed initial prices.

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The Public Service Commission of New York (P.S.C.), on June 22, 1961, filed a motion addressed to all the instant proceedings[2] requesting, "* * * orders complying with judicial mandates or requiring the posting of bond or filing of undertakings to assure refunds of any amounts of initial rates herein found unlawful." A similar motion, requesting the Commission to provide interim consumer protection in compliance with judicial mandates was filed by the Long Island Lighting Company, Philadelphia Electric Company, Public Service Electric and Gas Company and The United Gas Improvement Company (Joint Movants), on July 10, 1961.[3] The order issued herein will

[2] Except Docket No. G-17447. P.S.C.'s motion also speaks to several proceedings not covered by this order.

[3] Joint Movants address their motion to the Group I and III dockets (except Docket Nos. G-13293, G-13746, G-14244 and G-17447) as well as other proceedings not covered by this order.

clarify the Commission's position in regard to refund obligations, but deny the relief sought by these motions, insofar as they request the posting of bond to assure refunds. We note that the cost of bonding, if the bonds were to provide adequate coverage, would be excessive and we do not believe that bonds are required to protect the public interest.

Hope Natural Gas Company, purchaser in the Group II proceedings, filed a petition for declaratory order under Section 1.7(c) of the Commission's Rules of Practice and Procedure on August 16, 1961, requesting that the Commission either affirm the propriety of Hope's continuing to pay the contract prices which are the subject of those proceedings or take such further action as the Commission may deem appropriate under the circumstances. Neither P.S.C. nor Joint Movants have challenged the propriety of Hope's continuing to make payments in accordance with the contract rates filed by the producers. Neither P.S.C. nor Joint Movants answered Hope's petition; but several producers have done so and pointed out that they agreed with Hope's position that it should pay the filed rates until such time as those rates are adjusted. These answers correctly observe that Hope fails to demonstrate the existence of any controversy or uncertainty which calls for issuance of a declaratory order under our Rules. Accordingly, Hope's petition should be dismissed.

The Commission orders:

(A) The amounts collected by the applicants listed in Appendices I, II and III (or by their predecessors or successors in interest) under the rate schedules covering the sales involved in the listed proceedings shall be subject to such refund provisions as the Commission may lawfully prescribe by its final order in these proceedings (all of which have been consolidated with Docket No.

AR61-2) to the extent, if any, that the rate which has been collected exceeds the rate ultimately found to accord with the requirements of the public convenience and necessity.

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(B) Except as hereinabove granted, the motions of Transcontinental Gas Pipeline Corporation, filed June 13, 1960, of the Public Service Commission of New York, filed June 22, 1961, and of Long Island Lighting Company, Philadelphia Electric Company, Public Service Electric and Gas Company and The United Gas Improvement Company, filed July 10, 1961, are denied insofar as they relate to the dockets listed in Appendices I, II and III.

(C) The petition of the Hope Natural Gas Company, filed on August 16, 1961, is dismissed.

(D) The Secretary of the Commission is hereby directed to file a copy of this order as a part of each of the rate schedules listed in Appendices I, II and III, as well as any rate schedules which may hereafter be filed in connection with the sales proposed in Docket Nos. G-14355 and G-17341.

By the Commission.

GORDON M. GRANT
Act Secretary.

(SEAL)

APPENDIX I

Sales to Transcontinental Gas Pipeline Corporation (Transco); certificates issued by Opinion 315, 20 FPC 264;[1] remanded see 361 U.S. 195:

Docket No.	Seller	Rate Schedule No.	Total Price ¢/Mcf @ 15.025 psia
G-13169	Texaco-Seaboard Inc.	26	23.30
G-13183	Placid Oil Company, Operator *et al.*	19	23.55
G-13184	Placid Oil Company	18	23.55
G-13197	Frankel, J. R. *et al.*	2	23.55
G-13219	Atlantic Refining Company	189	23.30
G-13231	Pan American Petroleum Corporation	206	23.55
G-13232	Pan American Petroleum Corporation	205	23.55
G-13233	Pan American Petroleum Corporation, Operator *et al.*	204	23.55
G-13293	The California Company, a division of California Oil Company	12	22.8
G-13356	Amerada Petroleum Corporation	63	23.55
G-13642	Republic Natural Gas Company, Operator *et al.*	21[2]	23.55
G-13710	Sun Oil Company	92	23.55
G 13746	Socony-Mobil Oil Company, Inc.	176	22.2625
G-13757	Newmont Oil Company	3	22.2625
G-13758	Continental Oil Company	158	22.2625
G-13973	Sohio Petroleum Company	48	23.55
G-14109	Hassie Hunt Trust, Operator *et al.*	19	23.55
G-14164	Austral Oil Company, Inc., Operator Agent for Oil Participations Inc.	10[3]	23.55
G-14203	Union Oil Company of California	26	22.15

[1] The certificate issued in Docket No. G-13218 was vacated, and Lone Star Producing Company was permitted to withdraw its Rate Schedule No. 62 by our order of December 1, 1961.

[2] Interests of Texaco Inc., added temporary authorization issued June 30, 1959, in certificate Docket No. G-18344.

[3] Formerly Oil Participations Inc., Rate Schedule No. 9.

Docket No.	Seller	Rate Schedule No.	Total Price ¢/Mcf @ 15.025 psia
G-14227	Union Texas Natural Gas Corporation [4]	9	23.05
G-14240	Diversa Inc.	3 [5]	23.3
G-14242	Austral Oil Company, Inc., Operator Agent for Oil Participations Inc.	12 [6]	23.55
G-14243	Austral Oil Company, Inc., Operator Agent for Oil Participations Inc.	11 [7]	23.55

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G-14244	Phillips Petroleum Company	350	22.2625
G-14254	Sun Oil Company	101	21.40
G-14256	Humble Oil and Refining Company, Operator *et al.*	263 [8]	23.05
G-14346	The Ohio Oil Company	42	21.40
G-14351	The Pure Oil Company	39	21.40
G-14355	Cities Service Production Company	No rate schedule filed [8a]	
G-14356	Cities Service Production Company	9	23.55
G-14362	Union Oil Company of California	25	23.55
G-14385	Tidewater Oil Company	80	23.55
G-14604	Humble Oil and Refining Company	131	23.55
G-14605	Humble Oil and Refining Company	129	23.55
G-14606	Humble Oil and Refining Company	128	23.55
G-14607	Humble Oil and Refining Company	130	23.55

[4] Formerly Union Oil and Gas Corporation of Louisiana, Rate Schedule No. 9.

[5] Formerly C. G. Glasscock-Tidelands Oil Co., Rate Schedule No. 3.

[6] Formerly Oil Participations, Inc., Rate Schedule No. 11.

[7] Formerly Oil Participations, Inc., Rate Schedule No. 10.

[8] Formerly Monterey Oil Company Rate Schedule No. 13. This rate schedule is in a Section 4(e) proceeding, Docket No. G-17663.

[8a] Sales made pursuant to Austral Oil Company, Inc., Operator, Rate Schedule No. 12.

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APPENDIX II

Sales to Hope Natural Gas Company; certificates issued by Opinion 327, 22 FPC 378; remanded, see 287 F. 2d 146 (CADC):

Docket No.	Seller	Rate Schedule No.	Total Price ¢/Mcf @ 15.025 psia
G-17336	Texas Gas Exploration Corporation, Operator *et al.*	3	23.55
G-17337	J. Ray McDermott and Company, Inc.	12	23.55
G-17338	Kilroy Properties, Inc., *et al.*	3	23.55
G-17339	The California Company, a division of California Oil Company, Operator *et al.*	14	23.55
G-17340	Callery Properties, Inc.	2	23.55
G-17341	Callery Properties, Inc.	No rate schedule filed [8b]	
G-17342	Ocean Drilling and Exploration Company	1	23.55
G-17343	Ocean Drilling and Exploration Company, Operator *et al.*	2	23.55
G-17391	Humble Oil and Refining Company	167	23.55
G-17393	Amerada Petroleum Corporation	85	23.55
G-17396	Kerr-McGee Oil Industries Inc.	64	23.55

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G-17397	Bel Oil Corporation	7	23.55
G-17398	Sands, Caroline Hunt *et al.*	5	23.55
G-17399	Sid W. Richardson d/b/a Richardson & Bass, Operator *et al.*	2	23.05
G-17401	Socony-Mobil Oil Company, Inc.	203	23.55
G-17402	Beck Oil Company	2[9]	23.55
G-17405	Phillips Petroleum Company *et al.*	355	23.55
G-17407	Amerada Petroleum Corporation	84	23.05

[8b] Sales not initiated.

[9] Tentative; this rate schedule has not yet been accepted for filing.

Docket No.	Seller	Rate Schedule No.	Total Price ¢/Mcf @ 15.025 psia
G-17413	Mississippi River Fuel Corporation	14	23.55
G-17457	Union Oil Company of California	38	23.55
G-17463	Tidewater Oil Company	92	23.55
G-17474	Tidewater Oil Company	91	23.55
G-17475	Tidewater Oil Company	89	23.55
G-17483	Tidewater Oil Company	90	23.05
G-17554	Continental Oil Company	174	23.55
G-17560	Shell Oil Company	215	23.55
G-17566	Continental Oil Company	171	23.55
G-17574	Pan American Petroleum Corporation	266	23.05

APPENDIX III

Sales to Transco: certificates issued by order of November 17, 1959, 22 FPC 836, rehearing granted as to the following dockets only by unreported order of January 15, 1960, in docket numbers G-16603 *et al:*

Docket No.	Seller	Rate Schedule No.	Total Price ¢/Mcf @ 15.025 psia
G-16540	Republic Natural Gas Company *et al.*	23	23.55
G-17381	Kerr-McGee Oil Industries, Inc.	69	22.2625
G-17417	Pan American Petroleum Corporation	312[10]	22.2625
G-17444	Southern Natural Gas Company—Phillips Petroleum Company, Joint Venture	1	22.2625
G-17447	Phillips Petroleum Company	342[10]	22.2625

[10] Tentative; this rate schedule has not yet been accepted for filing.

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Docketed Feb. 5, 1962

BEFORE THE
FEDERAL POWER COMMISSION

Docket No. G-17340

In the Matter of

CALLERY PROPERTIES, INC.

Petition to Amend Certificate of Public Convenience and Necessity

Comes now Callery Properties, Inc., (Callery) and, pursuant to Section 1.7 of the Commission's Rules of Practice and Procedure, hereby petitions to amend the certificate of public convenience and necessity issued in the above-captioned proceeding on August 10, 1959 (22 F.P.C. 378) to reflect the dedication of production from an additional 96.352 acres to the sale of natural gas now being made to Hope Natural Gas Company (Hope) from the Bayou Pigeon Field, Iberia Parish, Louisiana, under Callery's FPC Gas Rate Schedule No. 2. In support of this petition to amend, Callery respectfully shows:

I.

On December 24, 1958 Callery filed with the Commission an application for a certificate of public convenience and necessity authorizing a new sale of gas to Hope in the Bayou Pigeon Field under the terms and conditions of a gas sales contract dated December 10, 1958, filed contemporaneously as Callery's FPC Gas Rate Schedule No. 2.

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By Opinion No. 327 and order issued August 10, 1959, in *Texas Gas Transmission Corporation, et al.*, Docket Nos.

G-17335, *et al.*, (22 F.P.C. 378), the Commission granted Callery a permanent certificate in Docket No. G-17340 authorizing its proposed sale to Hope in the Bayou Pigeon Field.

II.

On October 6, 1960 Callery and Pioneer Oil & Gas Co., Inc., (Pioneer) acquired by assignment from J. Harry Henderson, Jr., (Henderson) one-half (½) and one-fourth (¼) working interests, respectively, in certain non-productive acreage in the Bayou Pigeon Field formerly committed by Humble Oil & Refining Company (Humble) to the performance of a gas sales contract between Humble and Hope (Humble's FPC Gas Rate Schedule No. 167) and conveyed by Humble to Henderson by assignment dated September 13, 1960.

The assigned acreage having thereafter been made part of a unit of which Callery is the operator and from which gas is sold to Hope under Callery's Rate Schedule No. 2, Callery, Pioneer and Henderson entered into an agreement with Hope on September 19, 1961 placing said acreage under the Hope-Callery gas sales contract. Accordingly, Callery's certificate in Docket No. G-17340 should now be amended to reflect the dedication of this additional acreage in the Bayou Pigeon Field.

III.

Copies of the following documents, each of which is incorporated herein by reference, are being filed concurrently as supplements to Callery Properties, Inc., FPC Gas Rate Schedule No. 2:

(1) Assignment from Humble Oil & Refining Company to J. Harry Henderson, Jr., dated September 13, 1960, covering John L. Hodges, *et al.*, Lease of 96.352 acres more or less, Iberia Parish, Louisiana;

(2) Assignment from J. Harry Henderson, Jr., to Callery Properties, Inc., and Pioneer Oil & Gas Co., Inc., dated October 6, 1960; and

(3) Agreement dated September 19, 1961 between Hope Natural Gas Company; Callery Properties, Inc.; Pioneer Oil & Gas Co., Inc.; and J. Harry Henderson, Jr.

IV.

Correspondence and communications regarding this petition should be addressed to each of the following:

Mr. Gaston C. Jones
Callery Properties, Inc.
400 Bank of the Southwest Building

Richard F. Generelly, Esquire
May, Shannon and Morley
1700 K Street, N. W.
Washington 6, D. C.
Houston 2, Texas

WHEREFORE, Callery respectfully requests that the Commission amend the certificate heretofore issued to Callery on August 10, 1959 in Docket No. G-17340 to reflect the dedication of the additional acreage described herein and

in the supplements to Callery's FPC Gas Rate Schedule No. 2 being filed concurrently herewith.

Respectfully submitted,

CALLERY PROPERTIES, INC.
By RICHARD F. GENERELLY
Richard F. Generelly
Its Attorney

ROBERT E. MAY
RICHARD F. GENERELLY
May, Shannon and Morley
1700 K Street, N. W.
Washington 6, D. C.
Attorneys for Callery Properties, Inc.

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Docketed Mar. 7, 1962

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Joseph C. Swidler, Chairman; L. J. O'Connor, Jr., and Charles R. Ross.

	Docket Nos.
TEXACO-SEABOARD INC. *et al.*	G-13169 *et al.*[1]
TEXAS GAS EXPLORATION COMPANY *et al.*	G-17336 *et al.*[1]
REPUBLIC NATURAL GAS COMPANY *et al.*	G-16540 *et al.*[1]
THE CALIFORNIA COMPANY	G-16108
THE SUPERIOR OIL COMPANY	G-16388
SUNRAY MID-CONTINENT OIL COMPANY	G-14753
SUN OIL COMPANY	G-15122
THE SUPERIOR OIL COMPANY	G-16380
AREA RATE PROCEEDING	AR61-2

[1] See Appendices I, II, and III for a complete listing of applicants and docket numbers.

Order Denying Rehearing Severing and Consolidating Proceedings and Providing Further Procedures

(Issued March 7, 1962)

Our order of January 10, 1962, in three groups of proceedings (Docket Nos. G-13169 *et al.*, G-17336 *et al.*, G-16540 *et al.*; see Appendices I, II, and III hereto) declared, *inter alia*, an obligation to make refunds on the part of the producer-applicants in those proceedings. Numerous parties have filed applications for rehearing.[2] Our order of February 14, 1962, granted rehearing upon the applications filed by Pan American and the New York Public Service Commission so that we might consider all objections to our order of January 10 at one time. The various applications for rehearing persuade us to prescribe further procedures designed to abbreviate the duration of applicants' refund uncertainties. Otherwise, the applications contain no facts or arguments which call for modification of our January 10 order and should be denied. See *Socony Mobil Oil Company, Inc.*, order issued September 25, 1961, in Docket No. G-13780.

Applicants misapprehend the powers asserted by us in our January 10 order. Thus Austral Oil Company complains of our so-called "entrapment" here:

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[2] Pan American Petroleum Corporation (3 applications); Public Service Commission of the State of New York; Phillips Petroleum Company (2 applications); Kerr-McGee Oil Industries, Inc.; Cities Service Production Company; Long Island Lighting Company, Philadelphia Electric Company, and The United Gas Improvement Company ("The Eastern Seaboard Companies", jointly); Humble Oil & Refining Company; Austral Oil Company; Hassie Hunt Trust, Operator, *et al.*; Placid Oil Company; Continental Oil Company and Newmont Oil Company (jointly); J. R. Frankel *et al.*, now Berkshire Oil Company; Socony Mobil Oil Company, Inc.; Shell Oil Company; Amerada Petroleum Corporation; Tidewater Oil Company; Sohio Petroleum Company; Phillips Petroleum Company and Southern Natural Gas Company (joint venture); Sun Oil Company; and Union Oil Company of California.

> • • • If such a procedure were valid, the Commission could simply issue unconditional certificates, as it has done in this case, and then after the producer has commenced deliveries, summarily issue him a new temporary or permanent certificate subject to the condition that he refund all amounts in excess of the initial rate ultimately determined to be proper in some later proceeding. Thus, the producer would be effectively denied a free choice to accept or reject such conditioned certificate and would be given no opportunity to present evidence to support his initial contract price prior to the imposition of the refund condition. • • •

Our January 10 order asserts no such general power to modify final orders, properly issued after hearing pursuant to Section 7(c) of the Natural Gas Act. The special history of these three groups of proceedings defines the limited power of modification involved here. In every case the statutory hearing has already been held and the producers afforded an opportunity to adduce evidence supporting their price proposals. Our unconditional certificate orders under Section 7 were erroneously issued in the first place and as a result of the invocation of Section 19 have never assumed finality. (The provisions of Section 19 sharply distinguish this Act from the statute construed in *C.A.B.* v. *Delta Air Lines*, 367 U.S. 316.) Obviously the substantive errors were ours in accepting the arguments propounded by the producer-applicants; equally obvious, the New York Public Service Commission and the Eastern Seaboard Company[3] have consistently, publicly, and in the final analysis successfully urged the error of these arguments. The courts having lain bare the errors, it remains our task equitably to correct them. See *Ford Motor Company* v. *N.L.R.B.*, 305 U.S. 364. Where we grant re-

[3] See note 2, above.

hearing under Section 19(a) we may modify our order without further hearing; a judicial remand after we deny rehearing puts the case in the same posture as if we had initially granted rehearing, subject to any special instructions in the mandate. The remedial action to be taken by us in either event will turn on the equities presented.

Taking such remedial action differs from the ordinary processing of certificate applications. The typical Section 7(c) case involves ultimately the broad question whether the applicant should be permitted to enter the field; review of proposed initial rates is but on facet

of our certificate powers. When an applicant first proposes interstate service (and prior to dedication under Section 7(c) of the Act) he is not only entitled to the statutory processes, fairly administered; but he is also privileged to reject, for whatever reasons he wishes, any tendered certificate, no matter how reasonable the terms offered. In these remedial proceedings, we are called upon to exercise only our rate review powers under Section 7; no question arises as to the propriety of allowing the producers to introduce their gas into jurisdictional commerce. Thus nothing imperils the producers' "security of certificate". By the same token, there can be no private option here to accept or reject the results of our initial rate review at the regulated company's whim, any more than a company is free to accept or reject the results of a rate review proceeding under Section 4 or 5 of the Act. Consideration of the three groups of proceedings at issue brings these matters into focus.

Docket Nos. G-13169 *et al.* were heard and originally decided by us in 1958, prior to the Supreme Court's 1959 decision in *Catco* (360 U.S. 378). The producers accepted the unconditional certificates prior to the expiration of the

30-day period prescribed by Section 19(a) of the Act for seeking rehearing, and commenced deliveries. No producer sought an extension of time in which to accept the certificates. But the record and the briefs show that the producers' price proposals were opposed throughout the 1958 proceedings. Thus the producers have not been "entraped"; rather, in presenting their cases and commencing deliveries, they took a calculated risk as to the outcome of any review proceedings which might be brought. Such proceeding in fact resulted in the remand. *P.S.C. of New York* v. *F.P.C.*, 361 U.S. 195.

Upon reconsidering the record as a whole (including the record in G-13143 *et al.*, which originally accompanied that in G-13169 *et al.*), we have concluded that our 1958 order was erroneous, that the record does not show the price proposals of the producers to be in the public interest, and that the record shows, rather, that the proposed prices are out of line. Indeed even the lowest prices here proposed (21.4 cents per Mcf) exceed all of the effective rates shown in Exhibit 13 in the original record, save only some of the Duck Lake and Erath Field sales to United Gas Pipe Line Company and United Fuel Gas Company.[4] The examiner believed that our precedents as of that time barred the use of existing prices to test new price proposals. It is notable, however, that he found only four instances in which the Commission "has heretofore issued or had recommended to it the issuance of unconditioned certificates for sales in the southern Louisiana area at prices as high or higher than those involved herein."

20 FPC at 336, note 14. One of these was the proposed *Catco* price which may not, of course, be relied upon.

[4] Even those high rates are shown, with but one exception, as being effective subject to refund under Section 4 of the Act.

Another involved proposed contractual sales to Texas Eastern Transmission Corporation, which were abrogated before deliveries had commenced (see 21 FPC 860). Thus only two of the instances cited by the examiner may be considered: Three contracts at 21.5 cents per Mcf (including tax; see 19 FPC 618), and eleven contracts at 22.8 cents per Mcf (including tax; see 19 FPC 558). Moreover, the examiner found it beyond dispute that Transco's purchase of gas at the proposed levels would "trigger" favored nations clauses in many existing contracts, and that this "triggering" could result in a $5,000,000 annual increase in cost to the consumer. Our power eventually to test such increases under Section 4 of the Act is not enough, standing alone, to justify the immediate impact of such "triggering" on the price structure.

Docket Nos. G-17336 *et al.* were in hearing at the time of the Supreme Court's *Catco* decision. We issued unconditional certificates on August 10, 1959, largely in reliance upon the Court of Appeals' affirmance of our order in Docket Nos. G-13169 *et al.*, 269 F. 2d 865 (CA3, August 4, 1959), reversed 361 U.S. 195. The P.S.C. of New York actively contested the producer price proposals. The Court of Appeals held the record inadequate to support the initial prices proposed and remanded for further proceedings in which the producers might either augment the record or seek an appropriate price condtion. Exhibit No. 32 shows that these proposed prices, too, are out of line.

Docket Nos. G-16540 *et al.* were also in hearing at the time of the Supreme Court's *Catco* decision. In issuing unconditional certificates, on November 17, 1959, we relied heavily on the Court of Appeals' affirmance of our order in Docket Nos. G-13169 *et al.* as reflecting a correct interpretation of *Catco*. 22 FPC 836. When the Supreme Court reversed the Court of Appeals in that proceeding (361 U.S. 195 December 14, 1959), however, we promptly granted

the applications for rehearing which had been duly filed under Section 19(a). We granted a number of extensions of time in which to accept the certificates; but deliveries have ultimately commenced. As Exhibits 52 and 53 reveal, these prices too were out of line. Of the orders authorizing other south Louisiana sales, at comparable prices, cited by the examiner (22 FPC at 855, note 21) all have been remanded by the courts (save only one which was not appealed). Patently, our unconditional certificate order was erroneous in law and could not have been sustained on judicial review had we failed to grant rehearing. Having granted rehearing we should voluntarily correct the error just as if the courts had compelled us to do so. See *Ford Motor Co.* v. *N.L.R.B.*, 305 U.S. 364, 375.

4315

The Eastern Seaboard Companies contend we should forthwith redetermine the proceedings in Docket Nos. G-13169 *et al.*[5] on the basis of our recent determinations in the remanded *Catco* case (Opinion No. 351, issued January 22, 1962). Assuming that we have the power to do so, we nonetheless conclude that we should afford the producers further opportunity to be heard. The mandate of the Court of Appeals in Docket Nos. G-17336 *et al.* requires us to afford such opportunity and also, in effect, to receive and allow consideration of such settlement proposals as the producers may now see fit to offer. We think similar opportunities should be afforded the producers in the other proceedings.

On the other hand, many parties argue against leaving the initial price question in these cases to abide the outcome of the Area Rate proceeding. We are anxious to expedite final resolution of proceedings which have already been

[5] The Eastern Seaboard Companies are not participants in Docket Nos. G-17336 *et al.*

heard and decided once, but which remain on our docket by virtue of Section 19 of the Act. We are also impressed by representations as to the practical problems posed by the continuing pendency of these proceedings. As several producers observe, the uncertainties as to these initial prices complicate settlements with royalty owners and interfere with prudent budgeting and other financial matters. We are convinced that such uncertainties can quickly be dispelled in these proceedings as a result of the "ground rules," established by our recent *Catco* opinion, for certificate cases originally heard prior to issuance of our General Policy Statement. We shall, therefore, sever these proceedings from Docket No. AR61-2 and prescribe further procedures to achieve that result. These procedures will also be applicable to five additional south Louisiana certificate dockets remanded by the courts (Docket Nos. G-16108, G-16388, G-14753, G-15122 and G-16380).

In Opinion No. 351 (*Continental Oil Co.*, FPC , issued January 22, 1962) we determined the proper initial price by considering old and new field prices in the south Louisiana area, as of the year of the sales contract, and excluding the prices which the courts have called into question. We held the proper price line to fall between the highest group of prices and the median price and concluded, on the basis of a comprehensive record, that the "in line" price for 1956 contracts would be not in excess of 18.5 cents per Mcf, where State severance tax did not apply, and 20 cents per Mcf, where such tax applies. It is our present opinion that the "in line" price is also the "public interest" price in these proceedings. The instant proceedings, however, involve contracts executed after 1956; and we recognize that some parties may wish an opportunity to show that the appropriate price line in these proceedings differs from that we determined in *Catco*. Furthermore, we shall not foreclose any party

from presenting evidence which he believes would compel the conclusion that a higher price would be in the public interest. As in *Socony Mobil Oil Company, Inc.*, Docket No. G-13780, we shall require that any such evidence, as well as accompanying argument, be submitted in writing. In view of the large number of proceedings and parties here, however, it is suggested that a pre-hearing conference be convened by a presiding officer of the Commission.

The Commission further finds:

(1) It is reasonable and appropriate to sever and consolidate the above-captioned proceedings, to grant prompt opportunity for further hearing by providing for the submission of written evidence and argument, and to provide supplementary procedures, all as hereinafter prescribed.

(2) The assignments of error and grounds for rehearing set forth in the applications for rehearing cited in note 2, above, set forth no new facts or principles of law which were not fully considered by the Commission in adopting its order of January 10, 1962, in Docket Nos. G-13169 *et al.*, G-17336 *et al.*, and G-16540 *et al.*, or which having now been considered warrant any change or modification except as prescribed below.

The Commission orders:

(A) The proceedings in Docket Nos. G-13169 *et al.*, G-17336 *et al.*, G-16540 *et al.*, G-16108, G-16388 and G-14753 are severed from those in Docket Nos. AR61-2 *et al.*

(B) The proceedings listed in paragraph (A) above, as well as those in Docket Nos. G-15122 and G-16380, are consolidated for the limited purpose of determining the public interest initial price or prices applicable to these proceedings.

(C) On or before April 4, 1962, the participants to these proceedings shall serve and file with the Commission such written testimony, exhibits, and arguments, subscribed and verified by the witness or other person responsible for the preparation of such material, as they deem material to determination of the public interest initial price or prices in these proceedings.

(D) A hearing will be held in these proceedings at 10:00 a.m. (EST) on April 26, 1962, in a hearing room of the Federal Power Commission, 441 "G" Street, N.W., Washington, D.C.

4317

(E) Except as hereinabove granted the applications for rehearing of our order of January 10, 1962, are denied.

By the Commission.

(SEAL)

J. H. GUTRIDE
Joseph H. Gutride,
Secretary.

4318

APPENDIX I

Docket No.	*Seller*
G-13169	Texaco-Seaboard Inc.
G-13183	Placid Oil Company, Operator, *et al.*
G-13184	Placid Oil Company
G-13197	Frankel, J. R., *et al.*
G-13219	Atlantic Refining Company
G-13231	Pan American Petroleum Corporation
G-13232	Pan American Petroleum Corporation
G-13233	Pan American Petroleum Corporation, Operator, *et al.*

Docket No.	*Seller*
G-13293	The California Company, a division of California Oil Company
G-13356	Amerada Petroleum Corporation
G-13642	Republic Natural Gas Company, Operator, *et al.*
G-13710	Sun Oil Company
G-13746	Socony-Mobil Oil Company, Inc.
G-13757	Newmont Oil Company
G-13758	Continental Oil Company
G-13973	Sohio Petroleum Company
G-14109	Hassie Hunt Trust, Operator, *et al.*
G-14164	Austral Oil Company, Inc., Operator, Agent for Oil Participations, Inc.
G-14203	Union Oil Company of California
G-14227	Union Texas Natural Gas Corporation
G-14240	Diversa, Inc.
G-14242	Austral Oil Company, Inc., Operator, Agent for Oil Participations, Inc.
G-14243	Austrial Oil Company, Inc., Operator, Agent for Oil Participations, Inc.
G-14244	Phillips Petroleum Company
G-14254	Sun Oil Company
G-14256	Humble Oil and Refining Company, Operator, *et al.*
G-14346	The Ohio Oil Company
G-14351	The Pure Oil Company
G-14355	Cities Service Production Company
G-14356	Cities Service Production Company
G-14362	Union Oil Company of California
G-14385	Tidewater Oil Company
G-14604	Humble Oil and Refining Company
G-14605	Humble Oil and Refining Company
G-14606	Humble Oil and Refining Company
G-14607	Humble Oil and Refining Company

APPENDIX II

Docket No.	*Seller*
G-17336	Texas Gas Exploration Corporation, Operator, *et al.*
G-17337	J. Ray McDermott and Company, Inc.
G-17338	Kilroy Properties, Inc., *et al.*
G-17339	The California Company, a division of California Oil Company, Operator, *et al.*
G-17340	Callery Properties, Inc.
G-17341	Callery Properties, Inc.
G-17342	Ocean Drilling and Exploration Company
G-17343	Ocean Drilling and Exploration Company, Operator, *et al.*
G-17391	Humble Oil and Refining Company
G-17393	Amerada Petroleum Corporation
G-17396	Kerr-McGee Oil Industries, Inc.
G-17397	Bel Oil Corporation
G-17398	Sands, Caroline Hunt, *et al.*
G-17399	Sid W. Richardson d/b/a Richardson & Bass, Operator, *et al.*
G-17401	Socony-Mobil Oil Company, Inc.
G-17402	Beck Oil Company
G-17405	Phillips Petroleum Company, *et al.*
G-17407	Amerada Petroleum Corporation
G-17413	Mississippi River Fuel Corporation

Docket No.	*Seller*
G-17457	Union Oil Company of California
G-17463	Tidewater Oil Company
G-17474	Tidewater Oil Company
G-17475	Tidewater Oil Company
G-17483	Tidewater Oil Company
G-17554	Continental Oil Company
G-17560	Shell Oil Company
G-17566	Continental Oil Company
G-17574	Pan American Petroleum Corporation
	APPENDIX III
G-16540	Republic Natural Gas Company, *et al.*
G-17381	Kerr-McGee Oil Industries, Inc.
G-17417	Pan American Petroleum Corporation
G-17444	Southern Natural Gas Company—Phillips Petroleum Company, Joint Venture
G-17447	Phillips Petroleum Company

4329

Docketed Mar. 16, 1962

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Docket Nos. G-13169 *et al.*
TEXACO-SEABOARD INC., ET AL.

Errata Notice

(March 16, 1962)

ORDER DENYING REHEARING SEVERING AND CONSOLIDATING PROCEEDINGS AND PROVIDING FURTHER PROCEDURES

(Issued March 7, 1962)

Page 1, Please correct footnote 2 to read as follows.

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2 Pan American Petroleum Corporation; Public Service Commission of the State of New York; Phillips Petroleum Company; Kerr-McGee Oil Industries, Inc.; Cities Service Production Company; Long Island Lighting Company, Philadelphia Electric Company, and The United Gas Improvement Company ("The Eastern Seaboard Companies", jointly); Humble Oil & Refining Company; Austral Oil Company; Hassie Hunt Trust, Operator, *et al.*; Placid Oil Company; Continental Oil Company and Newmont Oil Company (jointly); J. R. Frankel *et al.*, now Berkshire Oil Company; Socony Mobile Oil Company, Inc; Shell Oil Company; Amerada Petroleum Corporation; Tidewater Oil Company; Sohio Petroleum Company; Phillips Petroleum Company and Southern Natural Gas Company (joint venture); Sun Oil Company; Union Oil Company of California; Caroline Hunt Sands and Loyd B. Sands; Beck Oil Company *et al.*; J. Ray McDermott and Company, Inc.; Callery Properties, Inc.; Continental Oil Company; Mississippi River Fuel Corporation; Kilroy Properties, Inc., *et al.*, Ocean Drilling & Exploration Company (Operator), *et al.*, Bel Oil Corporation, and Sid W. Richardson d/b/a Richardson & Bass, (Operator), *et al.* (jointly); and Texas Gas Exploration Corporation, *et al.*

Page 3, line 2, change "7(c)" to "7(b)"

GORDON M. GRANT
Gordon M. Grant
Acting Secretary

4483

Docketed Mar. 27, 1962

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

	Docket Nos.
Texaco-Seaboard Inc., et al.	G-13169, *et al.*
Texas Gas Exploration Company, et al.	G-17336, *et al.*
Republic Natural Gas Company, et al.	G-16540, *et al.*
The California Company	G-16108
The Superior Oil Company	G-16388
Sunray Mid-Continent Oil Company	G-14753
Sun Oil Company	G-15122
The Superior Oil Company	G-16380
Area Rate Proceeding	AR61-2

Notice of Extension of Time and Postponement of Hearing

(March 27, 1962)

Upon consideration of several motions and requests filed for an extension of time within which to serve and file with the Commission such written testimony, exhibits, and arguments as they deem material to determination of the public interest initial price or prices in these proceedings as required by the Commission's order issued March 7, 1962, and postponement of the hearing now scheduled for April 26, 1962, in the above-designated matters;

An extension is granted from April 4, 1962, to May 4, 1962, within which to serve and file the data specified by Paragraph (C) of order issued March 7, 1962; and the hearing now scheduled for April 26, 1962, is hereby postponed to May 29, 1962, at 10:00 a.m. (EDST), in a hearing room of the Federal Power Commission, 441 G Street,

N.W,. Washington, D. C. Paragraphs (C) and (D) of said order issued March 7, 1962, are amended accordingly.

J. H. GUTRIDE
Joseph H. Gutride
Secretary

4601

Docketed Apr. 13, 1962

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners:

Docket No. G-13169, *et al.**

TEXACO-SEABOARD, INC., ET AL.

Order Convening Settlement Conference

(Issued April 13, 1962)

Numerous applicants in these proceedings have requested that we convene a conference to consider the possibility of settlement in at least some of these consolidated proceedings. Thus Continental Oil Company, Newmont Oil Company, Sohio Petroleum Company, Humble Oil & Refining Company, Texaco-Seaboard, Inc., J. R. Frankel, *et al.*, and Sunray Mid-Continent Oil Company on March 22, 1962, filed a joint and several petition requesting such conference. In support of their petition Continental, *et al.*, aver, in part, that they "believe there is no great difference between Applicants and the Interveners as to the appropriate initial prices applicable to Applicants' sales in these proceedings" and that it is "likely that agreement can now be reached among the parties as to a settlement price which

* See our order of March 7, 1962, herein for complete listing of Applicants and dockets in these consolidated proceedings.

would be in the interest of all parties involved in these proceedings and which settlement price would serve the public interest."

In these circumstances, it is appropriate that we convene a settlement conference at which the parties and our staff may consider such settlement proposals as are forthcoming regarding any of these proceedings. Should the convenience of any party or group of parties necessitate the holding of separate conferences, the staff shall make appropriate arrangements therefor.

4602

The Commission orders:

A settlement conference will be held in these proceedings at 10:00 a.m. (EST) on April 25, 1962, in a conference room of the Federal Power Commission, 441 "G" Street, N. W., Washington, D. C.

By the Commission.

J. H. GUTRIDE
Joseph H. Gutride
Secretary

(SEAL)

4603

Docketed Apr. 16, 1962

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Docket No. G-13169, *et al.*

TEXACO SEABOARD, INC., ET AL.

Errata Notice

(April 16, 1962)

ORDER CONVENING SETTLEMENT CONFERENCE

(Issued April 13, 1962)

Please insert, after the words "Before Commissioners:", Joseph C. Swidler, Chairman; Lawrence J. O'Connor, Jr., Charles R. Ross and Harold C. Woodward.

GORDON M. GRANT
Gordon M. Grant
Acting Secretary

4695

Docketed Apr. 30, 1962

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Docket Nos. G-13169, *et al.*
TEXACO-SEABOARD INC., ET AL.

Docket Nos. G-17336, *et al.*
TEXAS GAS EXPLORATION COMPANY, ET AL.

Docket Nos. G-16540, *et al.*
REPUBLIC NATURAL GAS COMPANY, ET AL.

Docket No. G-16106
THE CALIFORNIA COMPANY

Docket No. G-16388
THE SUPERIOR OIL COMPANY

Docket No. G-14753
SUNRAY MID-CONTINENT OIL COMPANY

Docket No. G-15122
SUN OIL COMPANY

Docket No. G-16380
THE SUPERIOR OIL COMPANY

Notice of Further Extension of Time and Denial of Postponement of Hearing

(April 30, 1962)

Upon consideration of various motions and requests filed for a further extension of time within which to serve and file with the Commisison such written testimony, exhibits, and arguments as they deem material to determination of the public interest initial price or prices in these proceedings as required by the Commission's order

issued March 7, 1962 and postponement of the hearing now scheduled for May 29, 1962 in the above-designated matters;

A further extension is granted from May 4, 1962 to May 18, 1962 within which to serve and file the data specified by Paragraph (C) of said order issued March 7, 1962; and the requests for postponement of the hearing now scheduled for May 29, 1962 are hereby denied. Paragraph (C) of said order issued March 7, 1962 is amended accordingly.

GORDON M. GRANT
Gordon Mr. Grant
Acting Secretary

4733

Docketed May 14, 1962

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Docket Nos. G-13169 *et al.*

TEXACO-SEABOARD, INC. *et al.*

Ruling on Procedural Suggestions

(May 14, 1962)

On May 8, 1962, there was received from counsel for The Superior Oil Company a letter dated May 7, 1962, containing several procedural suggestions intended to expedite the hearing in this matter and reciting that a copy thereof would be mailed to each party whose name appears on the most recent service list. No comments adverse to such proposals have been received.

The Commission's order of March 7, 1962, among other things suggested that a prehearing conference be convened by the presiding officer and ordered that:

(C) On or before April 4, 1962, the participants to these proceedings shall serve and file with the Com-

mission such written testimony, exhibits, and arguments, subscribed and verified by the witness or other person responsible for the preparation of such material, as they deem material to determination of the public interest intitial price or prices in these proceedings.

(D) A hearing will be held in these proceedings at 10:00 a.m. (EST) on April 26, 1962, in a hearing room of the Federal Power Commission, 441 "G" Street, N. W., Washington, D. C.

By notices dated March 27 and April 30, 1962, the Secretary of the Commission extended from April 4 to May 18, 1962, the time within which the data described in Paragraph (C) above should be filed and postponed the date of hearing from April 26 to May 29, 1962.

Superior's letter of May 7, 1962, suggested "that May 29, 1962, be set aside as a day to discuss procedural aspects of the hearing, including the scheduling of these [a large number of witnesses expected to be presented by the various respondents] witnesses." It suggested also that the Presiding Examiner not require the attendance of all witnesses at the session of the hearing to be held on May 29, 1962, but that instead their testimony be presented for the record upon condition that the witness in each instance when called for cross-examination be properly sworn and adopt it as his direct testimony.

The suggestions set out above should facilitate the development of the record herein and are adopted; the session of May 29, 1962, will be devoted to the insertion in the record, in the manner above described, of the testimony, exhibits and argument which shall have been filed and served on May 18, 1962, upon the other participants

entitled to receive the same, and to a discussion of the procedural aspects of the hearing, including the order in which witnesses should appear for adoption of the direct testimony and cross-examination.

There shall also be considered at that session any or all of the purposes of conferences described in Section 1.18(b) of the Commission's Rules of Practice and Procedure. Counsel should then also be prepared to state which, if any, of said witnesses will not be called upon to subject themselves to cross-examination.

This ruling is not to be construed, however, as postponement of the hearing beyond May 29, 1962. On the contrary, witnesses, should be prepared, in the order then fixed by the Presiding Examiner, to appear at a subsequent session on May 31, 1962, or thereafter, as he may direct.

EDWARD B. MARSH
Edward B. Marsh
Chief Hearing Examiner

4737

Docketed May 15, 1962

UNITED STATES OF AMERICA
BEFORE THE FEDERAL POWER COMMISSION

Docket Nos. G-13,758, G-17,554, G-17,566

In the Matters of
CONTINENTAL OIL COMPANY

Motion for Continuance of Hearing

The Continental Oil Company, Applicant, who is authorized to state the concurrence of Intervenors Brooklyn Union Gas Company, Consolidated Edison Com-

pany of New York, Inc., Long Island Lighting Company, Public Service Electric and Gas Company, and The United Gas Improvement Company, respectfully requests that a continuance of thirty (30) days be granted from May 18, 1962 until June 18, 1962 for the filing of data specified by Paragraph (C) of the Commission's Order issued March 7, 1962 in the above captioned proceedings and that a similar postponement of the hearing now scheduled for May 29, 1962 until June 29, 1962 be granted. In support of such request, Movant states as follows:

1. Applicant and the above-named Intervenors have, after negotiations, arrived at a settlement with respect to the subject dockets, which incorporates the following basic elements:

(a) Price:

gas not subject to taxing jurisdiction of the State of Louisiana—19.0 cents per Mcf

gas subject to taxing jurisdiction of the State of Louisiana—20.625 cents Mcf

(c) Moratorium on future rate increase filing until July 1, 1967 unless a specifically applicable South Louisiana area price is theretofore established.

(d) Refunds in the amount of two-thirds the difference between the subject contract price received from the buyer and the settlement price, calculated on the total volume delivered from the date of initial delivery, plus interest.

2. Movant and Intervenors are now engaged in the preparation of a formal settlement filing incorporating the above elements which will be presented to the Commission

at the earliest possible time. While such formal proposal most likely cannot be filed with the Commission or acted upon by it prior to May 18, 1962, the date now fixed for presentation of data, such filing will be made within the period for which a continuance is requested.

Accordingly, Movant believes that the public interest would be served best by a continuance in the above-captioned dockets, as set forth above.

Respectfully submitted,

CONTINENTAL OIL COMPANY
By BRUCE R. MERRILL
Bruce R. Merrill
Counsel

4792

Docketed May 16, 1962

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Docket Nos. G-13169, *et al.*
TEXACO-SEABOARD INC., ET AL.

Docket Nos. G-14203, G-14362, G-17457
UNION OIL COMPANY OF CALIFORNIA

Docket Nos. G-16108, G-13293, G-17339
THE CALIFORNIA COMPANY

Docket Nos. G-13758, G-17554, G-17566
CONTINENTAL OIL COMPANY

Docket Nos. G-14256, G-14604, G-14605,
G-14606, G-14607, G-17391
HUMBLE OIL & REFINING COMPANY

Docket Nos. G-14355, G-14356
CITIES SERVICE PRODUCTION COMPANY

Docket No. G-14346
THE OHIO OIL COMPANY

Docket No. G-14227
UNION TEXAS PETROLEUM, a division of
Allied Chemical Corporation

Notice of Severance, Extension of Time and Postponement of Hearing

(May 16, 1962)

Upon consideration of the requests filed by Applicants in the above-designated matters, notice is hereby given that the proceedings in Docket Nos. G-14203, G-14362, G-17457, G-16108, G-13293, G-17339, G-13758, G-17554, G-17566,

G-14256, G-14604, G-14605, G-14606, G-14607, G-17391, G-14355, G-14356, G-14346 and G-14227 are hereby severed from the consolidated proceedings in Texaco-Seaboard Inc., et al., Docket Nos. G-13169, et al. heretofore scheduled for hearing on May 29, 1962 by order issued March 7, 1962, as modified by notice issued March 27, 1962.

An extension is hereby granted to the parties in the proceedings severed hereby to and including June 18, 1962 within which to serve and file the data specified by Paragraph (C) of the Commission's order issued March 7, 1962; and that hearings in the severed proceedings are scheduled to commence at 10:00 a.m., June 29, 1962, in a hearing room of the Federal Power Commission, 441 G Street N.W., Washington, D. C.

J. H. GUTRIDE
Joseph H. Gutride
Secretary

4798

Docketed May 17, 1962

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Docket Nos. G-13169, *et al.*
TEXACO-SEABOARD INC., ET AL.

Docket No. G-13169
TEXACO INC. (formerly Texaco-Seaboard Inc.)

Docket No. G-13973
SOHIO PETROLEUM COMPANY

Docket Nos. G-14164, G-14242, G-14243
AUSTRAL OIL COMPANY

Docket No. G-17397
BEL OIL CORPORATION

Docket No. G-13219
THE ATLANTIC REFINING COMPANY

Docket No. G-13757
NEWMONT OIL COMPANY

Docket Nos. G-14385, G-17463, G-17474,
G-17475, G-17483
TIDEWATER OIL COMPANY

Notice of Severance, Extension of Time and Postponement of Hearing

(May 17, 1962)

Upon consideration of the requests filed by Applicants in the above-designated matters, notice is hereby given that the proceedings listed above are hereby severed from the

proceedings consolidated by order issued March 7, 1962, under the lead docket, Texaco-Seaboard Inc., et al., Docket Nos. G-13169 et al., heretofore scheduled for hearing on May 29, 1962, by order issued March 7, 1962, as modified by notice issued March 27, 1962.

An extension is hereby granted to the parties in the proceedings severed hereby to and including June 18, 1962 within which to serve and file the data specified by Paragraph (C) of the Commission's order issued March 7, 1962; and that hearings in the severed proceedings are scheduled to commence at 10:00 a.m., June 29, 1962, in a hearing room of the Federal Power Commission, 441 G Street N.W., Washington, D. C.

J. H. GUTRIDE
Joseph H. Gutride
Secretary

4799

Docketed May 17, 1962

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Docket Nos. G-13169, *et al.*
TEXACO-SEABOARD INC., ET AL.

Docket No. G-14351
THE PURE OIL COMPANY

Docket Nos. G-14244, G-17405, G-17447
PHILLIPS PETROLEUM COMPANY

Docket No. G-17444
SOUTHERN NATURAL GAS COMPANY—PHILLIPS PETROLEUM COMPANY, Joint Venture

Docket Nos. G-17381, G-17396
KERR-MCGEE OIL INDUSTRIES, INC.

Docket Nos. G-13231, G-13232, G-13233, G-17574, G-17417
PAN AMERICAN PETROLEUM CORPORATION

Notice of Denial of Requests for Further Extension of Time

(May 17, 1962)

Notice is hereby given that the requests filed by Applicants in the above listed proceedings, except Docket G-13169, for a further extension of time within which to serve and file with the Commission such written testimony, exhibits, and arguments as they deem material to determination of the public interest initial prices in these proceedings as required by the Commission's order issued

March 7, 1962, as modified by notcies issued March 27, 1962 and April 30, 1962, are denied.

J. H. GUTRIDE
Joseph H. Gutride
Secretary

4810

Docketed May 18, 1962

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Docket No. G-17336
TEXAS GAS EXPLORATION CORPORATION

Notice of Severance, Extension of Time and Postponement of Hearing

(May 18, 1962)

Upon consideration of the request filed by Applicant in the above-designated matter, notice is hereby given that the proceeding listed above is hereby severed from the proceedings consolidated by order issued March 7, 1962, under the lead docket, Texaco-Seaboard Inc., et al., Docket Nos. G-13169 et al., heretofore scheduled for hearing on May 29, 1962, by order issued March 7, 1962, as modified by notice issued March 27, 1962.

An extension is hereby granted to the participants in the proceeding severed hereby to and including June 18, 1962 within which to serve and file the data specified by Paragraph (C) of the Commission's order issued March 7, 1962; and that a hearing in the severed proceeding is scheduled to commence at 10:00 a.m., June 29, 1962, in a hearing room of the Federal Power Commission, 441 G Street N. W., Washington, D. C.

J. H. GUTRIDE
Joseph H. Gutride
Secretary

Transcontinental Gas Pipe Line Corporation

Favored Nations Increases Triggered by Initial Service

Sales in Opinion No. 315 13/

	A		B		C	D		E	F	G	H	I	J
	Seller & Rate Schedule No.		Field		Parish	Section 4(e) Docket No.		Date Effective Subject to Refund	Previous Rate 24/	Suspended Rate 25/	Volume 1959 14/	Volume 1960 14/	Volume 1961 14/
1													
2													
3	Magnolia Petroleum Co.	#16	2/ West Gueydan		Vermilion	G-17286		6-28-59	17.5	23.55	3480048	3344881	3151539
4	Tennec Seaboard Inc.	#28	3/ Live Oak		Vermilion	G-17613		6-30-59	17.5	23.55	5810495	4076947	3977158
5	Sinclair Oil & Gas Co.	#38	Palmetto		St. Landry	G-17785		7-2-59	17.5	23.55	94145	34058	30039
6	Sunray Mid-Continent Oil Co.	#17	4/ S. Duson		Lafayette	G-17786		7-2-59	17.5	23.55	3906947	3420781	866951
7	Sunray Mid-Continent Oil Co.	#43	Rayne		Acadia	G-17787		7-2-59	17.5	23.55	138135	148888	158805
8	Sunray Mid-Continent Oil Co.	#108	5/ Church Point		Acadia	G-17787		7-2-59	17.5	23.55	884078	503734	114579
9	Amerada Petroleum Corp.	#48	Leleux		Vermilion	G-17730		7-6-59	17.5	23.55	3136676	2876840	2816048
10	Sinclair Oil & Gas Co.	#78	Live Oak		Vermilion	G-17739		7-8-59	17.5	23.55	5215709	3888453	3331788
11	The Pure Oil Co.	#33	Gueydan & N.E. Gueydan		Vermilion	G-17709		7-9-59	17.0 1/	27/22.8 1/	1563948	1517896	1257085
12									17.75 1/	27/23.55 1/			
13	Phillips Petroleum Co.	#149	11/ Rayne		Beauregard	G-17740		7-9-59	17.5	23.55	1080148	988989	689870
14	Phillips Petroleum Co.	#150	Tigre Lagoon		Vermilion	G-17740		7-9-59	17.5	23.55	306057	431848	230369
15	Amoril Oil Co. Inc.,(Oper.) et al.	#1	Mowie		Acadia	G-17737		7-12-59	17.5	23.55	354869	800849	773083
16	The Atlantic Refining Co.	#118	Palmetto		St. Landry	G-17741		7-15-59	17.5	23.55	766950	610517	179318
17	The Atlantic Refining Co.	#147	Live Oak		Vermilion	G-17741		7-15-59	17.5	23.55	304355046	166403777	110666771
18	The Atlantic Refining Co.	#150	Rutherwood		Acadia	G-17741		7-15-59	17.5	23.55	499180	654665	657181
19	Continental Oil Co.	#161	6/ S. Duson		Lafayette	G-17936		8-5-59	17.5	23.55	692639	1485294	840682
20	Sun Oil Co. (Oper.) et al.	#44	Rayne		Acadia	G-17983		8-12-59	17.5	23.55	5833206	6789965	1086871
21	Sun Oil Co. (Oper.) et al.	#71	Coupee Creek & Kinder		Beauregard & Allen	G-17983		8-12-59	17.5	23.55	2275606	2894144	2836470
22													
23	Texas Gulf Producing Co.	#96	Gueydan		Vermilion	G-17985		8-14-59	17.5	23.55	799479	374788	268286
24	P. H. Rutherford	#3	Rutherwood		Acadia	G-17988		8-20-59	17.5	23.55	499049	422217	425138
25	Ted Weiner (Oper.), et al.	#3	S. Bayou Ballet		Acadia	G-17993		10-7-59	17.75 26/	23.55	197090	157682	114604
26	Stevens, Lake Sulphur Co., (Oper.) et al.	#2	Ellis		Acadia	G-17997		9-11-59	17.5	23.0 8/	1443516	1493103	1505741
27	Tidewater Oil Co.	#34	Leleux		Vermilion	G-17998		8-19-59	17.75 20/	23/23.55	127093	226693	247600
28	Tidewater Oil Co.(Oper.) et al.	#62	N. W. Gueydan		Acadia & Vermilion	G-17999		8-19-59	17.75 21/	23/23.55	1090757	501616	456891
29													
30	The Superior Oil Co.	#65	Live Oak		Vermilion	G-17989		9-23-59	17.5	23.55	1639865	1168084	1096806
31	Eddie Petroleum Co.	#26	Rayne		Acadia	G-18098		8-27-59	17.5	23.55	4464453	4945894	4323945
32	Willard E. Walker	#1	Coupee Creek		Beauregard	G-18099		15/	17.5	23.55	39121 9/	10/	19481
33	Southwest Gas Producing Co.,Inc.,et al	#9	Mowie		Acadia	G-18100		15/	17.5	23.55	2'3244	1086	10/
34													
35													

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ive t to	F Previous Rate 24/	G Suspended Rate 25/	H Volume 1959 14/	I Volume 1960 14/	J Volume 1961 14/
9	17.5	23.55	3480048	3344851	3151539
9	17.5	23.55	5810495	4076947	3877154
	17.5	23.55	941145	534058	30059
	17.5	23.55	3906947	3420781	868551
	17.5	23.55	138135	148888	198905
	17.5	23.55	884074	303734	114379
	17.5	23.55	3188676	2876840	2916048
	17.5	23.55	5815709	5888453	3831782
	17.0 1/ 27/	22.0 1/	1563948	1517896	1557085
	17.75 1/ 27/	23.55 1/			
	17.5	23.55	1080148	988989	689670
	17.5	23.55	306057	431858	230369
9	17.5	23.55	364869	600849	373083
9	17.5	23.55	766990	610517	179318
9	17.5	23.55	104550046	166340377	110666771
9	17.5	23.55	469180	654665	657181
	17.5	23.55	695639	1685594	840682
9	17.5	23.55	5835804	6709965	1088771
9	17.5	23.55	8875606	8694144	8836970
9	17.5	23.55	709479	374788	568896
9	17.5	23.55	490049	422237	425538
9	17.75 26/	23.55	197090	157682	114604
9	17.5	23.0 8/	1443516	1493103	1505741
9	17.75 28/ 29/	23.55	187093	226693	247600
9	17.75 31/ 29/	23.55	1090797	501616	456891
9	17.5	23.55	1639865	1168024	1096406
9	17.5	23.55	4464453	4445894	4323945
	17.5	23.55	39181 9/	10/	19481
	17.5	23.55	8 3244	1086	10/

Transcontinental Gas Pipe Line Corporation
Favored Nations Increases Triggered by Initial Service
Sales in Opinion No. 315 11/

A		B	C	D	E	F	G	H	I	J
Seller & Rate Schedule No.		Field	Parish	Section 4(e) Docket No.	Date Effective Subject to Refund	Previous Rate 22/ 23/	Suspended Rate 22/ 23/	Volume 1959 14/	Volume 1960 14/	Volume 1961 14/
Sel Oil Corp.	#3	North Elton	Allen	G-18217	9-21-59	17.75 17/	23.55	3593487	2604022	2289434
Shell Oil Co. (Oper.) et al.	#198	Bear	Beauregard	G-18469 12/	10-16-59	17.5	23.55	1125504	1053416	800823
Trice Production Co.	#3	Leleux	Vermilion	G-18516	3-1-60	17.5	23.55	44488	43625	237711
F. E. Jameson, et al.	#2	Bear	Beauregard	G-18672 12/	11-11-59	17.5	23.55	18984	215927	529367
Tidewater Oil Co.	#85	S. E. Rayne	Lafayette	G-18751	11-18-59	17.75 22/ 23/	23.55	128604	12170	No sale 7/
E. L. Hunt, et al.	#25	Vinton	Calcasieu	G-20071 12/	4-8-60	17.5	23.55	No sale	6743	4887
David Crow, Trustee	#3	Kinder	Beauregard	G-20083	4-26-60	17.75 18/	23.55	75365 9/	10/	32100
Gas Gathering Corp.	#2	Bayou Des Glaises	Iberville	G-20118 12/	4-26-60	17.5	23.55	4865713	4796655	4642586
Mound Co. et al.	#15	Coupen Creek	Beauregard	G-20275	5-10-60	17.75 19/	23.55	148253	447187	425012
J. P. Owen (Oper.) et al.	#2	S. E. Rayne & N. Ellis	Lafayette	G-20555	4-3-61	17.5	23.55	1171597	1103075	863008
Mercantile Oil Exploration Corp.	#1	Egan	Acadia	RI60-138	8-1-60	17.5	23.55	418135 9/	396000 9/	450050
Rosata Hunt Trust	#3	Maxie	Acadia	G-17431 26/ 28/	12-28-58	17.75 20/	23.55	1416195	1321701	197087
Wm. Herbert Hunt Trust Estate	#5	Oberlin	Allen	G-17432 26/ 28/	12-28-58	17.75 20/	23.55	2280613	1938328	1370870

1/ Includes tax reimbursements of 1.0¢ or 1.75¢ for the previous rate and 1.3¢ or 2.05¢ for the suspended rate.
2/ Now Sonny Mobil Oil Co. FPC Rate Schedule No. 16.
3/ Now Texaco Inc. FPC Rate Schedule No. 270.
4/ Superseded by FPC Rate Schedule No. 215 which eliminates favored nations clause. Effective subject to refund in Docket No. RI61-462 on 5-2-61.
5/ Superseded by FPC Rate Schedule No. 216 which eliminates favored nations clause. Effective subject to refund in Docket No. RI61-463 on 5-2-61.
6/ Superseded by FPC Rate Schedule No. 185 which eliminates favored nations clause. Effective subject to refund in Docket No. RI61-470 on 5-1-61.
7/ Sale terminated 4-5-60, abandonment authorized 12-1-61. Rate Schedule cancelled by Supplement No. 4, filed 5-8-61.
8/ Includes tax reimbursement of 1.5¢.
9/ Volume taken from comparative statement included with rate increase filing.
10/ Not available.
11/ Favored nations clause eliminated by Supplement No. 7, filed 3-7-60, effective 4-7-60.
12/ Renegotiated increase. Original agreements contained applicable favored nations clauses, however, in each case the parties elected to either supersede or change the rate s
increased rate of 23.55¢ including tax reimbursement.
13/ Some of the Producers cited Pan American sale under FPC Rate Schedule No. 342 (contract dated 10-21-58) in lieu of Opinion 315. Pan American is delivering under a temporary
14/ Volumes taken from Form 2 unless otherwise noted.
15/ Increased rates are under suspension and have not been made effective as of time of preparation of this exhibit.
16/ Includes a 1.75¢ tax reimbursement which is presently in effect subject to refund in Docket No. G-17670.
17/ Includes a 1.75¢ tax reimbursement which is presently in effect subject to refund in Docket No. G-17665.
18/ Includes a 1.75¢ tax reimbursement which is presently in effect subject to refund in Docket No. G-17669.
19/ Includes a 1.75¢ tax reimbursement which is presently in effect subject to refund in Docket No. G-17658.
20/ Includes a 1.75¢ tax reimbursement which is presently in effect subject to refund in Docket No. G-17668.
21/ Includes a 1.75¢ tax reimbursement which is presently in effect subject to refund in Docket No. G-17599.
22/ Includes a 1.75¢ tax reimbursement which is presently in effect subject to refund in Docket No. G-17700.
23/ Tidewater filed its favored nations increase in two phases. First a tax reimbursement of 2.05¢ was filed and accepted. Secondly a base rate of 21.5¢ was filed and suspended
24/ Includes a tax reimbursement of 1.3¢ unless otherwise noted.
25/ Includes a tax reimbursement of 2.05¢
26/ Suspension terminated and allowed by Commission order dated 3-6-59.
27/ Includes tax reimbursements of 1.0¢ and 1.75¢ that are presently in effect subject to refund in Docket No. G-17541.
28/ The tax reimbursement of 1.75¢ had been in effect subject to refund in Docket No. G-15581. Proceedings terminated and disallowed by Commission order dated 2-21-61.
29/ The tax reimbursement of 1.75¢ has been in effect subject to refund in Docket No. G-15581. Proceedings terminated and disallowed by Commission order dated 2-21-61.

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E Date Effective Subject to Refund	F Previous Rate 21/ 24/	G Suspended Rate 22/ 25/	H Volume 1959 14/	I Volume 1960 14/	J Volume 1961 14/
9-21-59	17.75 17/	23.55	3593487	2604022	2289434
10-16-59	17.5	23.55	1125504	1053416	800023
3-1-60	17.5	23.55	44488	43625	237711
11-11-59	17.5	23.55	18984	215927	529367
11-18-59	17.75 22/	23/23.55	128604	12170	No sale 7/
4-8-60	17.5	23.55	No sale	6743	4887
4-26-60	17.75 18/	23.55	75365 9/	10/	32100
4-26-60	17.5	23.55	4865713	4796655	4642986
5-10-60	17.75 19/	23.55	148253	[illegible]7787	425012
4-3-61	17.5	23.55	1171597	[illegible]075	863008
8-1-60	17.5	23.55	418135 9/	[illegible]6000 9/	450050
26/ 28/ 12-28-58	17.75 24/	23.55	1416195	1321701	197087
26/ 28/ 12-28-58	17.75 29/	23.55	2280813	1938328	1370870

the suspended rate.

ve subject to refund in Docket No. RI61-462 on 5-2-61.
ve subject to refund in Docket No. RI61-463 on 5-2-61.
ve subject to refund in Docket No. RI61-470 on 5-1-61.
ement No. 4, filed 5-8-61.

, however, in each case the parties elected to either supersede or change the rate schedule with an agreement that eliminated the favored nations clause and provided for the

ated 10-21-58) in lieu of Opinion 315. Pan American is delivering under a temporary certificate issued 12-4-58 in Docket No. G-16946.

ration of this exhibit.
et No. G-17670.
et No. G-17665.
et No. G-17669.
et No. G-17658.
et No. G-17668.
et No. G-17599.
et No. G-17700.
2.05¢ was filed and accepted. Secondly a base rate of 21.5¢ was filed and suspended.

nd in Docket No. G-17541.
Proceedings terminated and disallowed by Commission order dated 2-21-61.
Proceedings terminated and disallowed by Commission order dated 2-21-61.

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DISTRICT OF COLUMBIA }
CITY OF WASHINGTON }

VICTOR M. HODGE, being first duly sworn according to law, says he is Supervising General Engineer, Bureau of Natural Gas, Federal Power Commission; that the attached Exhibit entitled "Transcontinental Gas Pipe Line Corporation—Favored Nations Increases Triggered by Initial Service Sales in Opinion No. 315[18]" was prepared under his supervision and direction; that he is familiar with the contents thereof; and that the facts contained therein are true and correct to the best of his knowledge, information and belief.

VICTOR M. HODGE
Victor M. Hodge

Sworn and subscribed to before me
this 18th day of May, 1962.

(SEAL)

CARL C. BERGER

My Commission Expires July 14, 1966

5050

CERTIFICATE OF SERVICE

[Omitted in Printing]

5121

Docketed May 21, 1962

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

	Docket Nos.
TEXACO-SEABOARD, INC., ET AL.	G-13169, *et al.*
SUNRAY DX OIL COMPANY (formerly Sunray Mid-Continent Oil Company)	G-14753

Motion of Sunray DX Oil Company for Severance or in the Alternative, for a Continuance and Postponement of Hearing Date

Sunray DX Oil Company, Formerly Sunray Mid-Continent Oil Company, (Sunray), files this Motion for a severance of its Docket No. G-14753 from the above consolidated proceeding, or, in the alternative, for a continuance of the date established by the Federal Power Commission (Commission) for the submission of evidence and for a postponement of the date set by the Commission for a hearing in the above consolidated proceeding. In support thereof, Sunray states:

I.

Pursuant to the suggestion contained in the Commission's Order of March 7, 1962, Sunray has made a diligent effort to seek a settlement of the issues involved in the captioned Sunray

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proceeding. At this time, Sunray believes that settlement is possible and can be achieved based upon the following:

(a) Sunray proposes for its sale involved an initial price of 20.625¢ per Mcf at 15.025 psia, including tax reimbursement.

(b) Sunray will refund to Transcontinental Gas Pipe Line Corporation (Transco) the difference between the total contract price of 23.55¢ per Mcf and the proposed settlement price of 20.625¢ per Mcf on 66⅔% of the gross volumes of gas delivered from the date of initial delivery to the date when the proposed settlement price of 20.625¢ is established as the initial price applicable to the Sunray sale involved in G-14753, plus interest at the applicable rate.

(c) Sunray proposes a moratorium on filings for price increases authorized by its contract with Transco until on and after July 1, 1967, unless a specifically applicable South Louisiana area price has been established prior to said date.

(d) Sunray will amend its contract with Transco to provide that Transco's obligation to take or pay for gas can be made up over a four-year period.

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(e) The proposed initial price of 20.625¢ per Mcf will be appropriately tied into the results of the South Louisiana Area Rate Proceeding, Docket No. AR61-2, in a manner which will attempt to provide for the possible variances in the disposition of that proceeding by the Commission.

II.

Sunray intends to draft a settlement proposal which will incorporate the above basic points upon which settlement of this matter can be accomplished. Sunray will diligently endeavor to complete the formal settlement proposal at the earliest possible date.

III.

Sunray submits that it is in the interest of all concerned to allow it to effect, if possible, the above outlined settle-

ment and therefore, it, and the others concerned should not be put to the trouble and expense of presentation of evidence herein, representation at hearings, etc.

IV.

Sunray is advised that United Gas Improvement Company (UGI), distributing company intervenor herein, agrees that settlement of Docket No. G-14753 is possible on the basis

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set out in Paragraph I above, and supports this Motion for a Severance or Continuance.

WHEREFORE, Sunray moves that the Commission sever Docket No. G-14753 from the above consolidated proceeding or, in the alternative, continue the date established for the submission of evidence and postpone the scheduled hearing in the above-styled proceeding with regard to Sunray DX Oil Company's Docket No. G-14753 pending disposition of Sunray's settlement proposal.

Please change the name of Sunray DX Oil Company's representative to Homer E. McEwen, Jr.

Respectively submitted,

SUNRAY DX OIL COMPANY
DALE E. DOTY
1028 Connecticut Avenue, N. W.
Washington 25, D. C.

HOMER E. MCEWEN, JR.
P. O. Box 2039
Tulsa 2, Oklahoma

By HOMER E. MCEWEN, JR.
Homer E. McEwen, Jr.
Attorneys

May 17, 1962

5134

(Docketed May 22, 1962)

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Docket No. G-14753

SUNRAY DX OIL COMPANY
(formerly Sunray Mid-Continent Oil Company)

Notice of Severance, Extension of Time and Postponement of Hearing

(May 22, 1962)

Upon consideration of the request filed by Applicant in the above-designated matter, notice is hereby given that the proceeding listed above is hereby severed from the proceedings consolidated by order issued March 7, 1962, under the lead docket, Texaco-Seaboard Inc., et al., Docket Nos. G-13169 et al, heretofore scheduled for hearing on May 29, 1962, by order issued March 7, 1962, as modified by notice issued March 27, 1962.

An extension is hereby granted to the participants in the proceeding severed hereby to and including June 18, 1962 within which to serve and file the data specified by Paragraph (C) of the Commission's order issued March 7, 1962; and that a hearing in the severed proceeding is scheduled to commence at 10:00 a.m., June 29, 1962, in a hearing room of the Federal Power Commission, 441 G Street N. W., Washington, D. C.

J. H. GUTRIDE
Joseph H. Gutride
Secretary

5135

(Docketed May 22, 1962)

BEFORE THE FEDERAL POWER COMMISSION

Docket Nos. G-13183, *et al.*

Proceeding consolidated by order of March 7, 1962, formerly entitled: TEXACO SEABOARD, INC., *et al.*

Motion for Continuance

Staff respectfully requests a postponement of the hearing now scheduled for May 29, 1962, up to and until June 18, 1962. Such postponement is necessary to permit sufficient time to prepare for hearing.

By ruling of May 14, 1962, the Chief Examiner, acting upon the wise suggestion of The Superior Oil Company, prescribed that the first hearing day would be devoted to conference procedures. We wholeheartedly support the use of the pre-hearing conference technique in these proceedings. But that technique can succeed only if the participating attorneys are thoroughly prepared. Staff counsel has received voluminous quantities of position statements, proposed testimony and exhibits. In order to digest such materials sufficiently to be prepared both for pre-hearing conference and for actual hearing a postponement of pre-hearing conference to June 18, 1962 (with prompt hearing thereafter), is essential.

Respectfully submitted,

/s/ DAVID J. BARDIN
David J. Bardin
Staff Counsel

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(Docketed May 24, 1962)

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Docket Nos. G-13183, et al[1]

PLACID OIL COMPANY, OPERATOR, et al

Docket No. G-13169, et al[2]

TEXACO INC., (formerly Texaco-Seaboard Inc.), et al.

Notice Setting Forth Consolidated Dockets; New Lead Docket Number of Consolidated Proceeding; Severed Dockets; and Providing Opportunity for Receiving Service of Filed Documents, Etc.

(May 24, 1962)

Notice is hereby given that those dockets not severed from and which still remain in the proceedings originally consolidated by order of March 7, 1962 under the lead docket, Texaco-Seaboard, Inc., et al., Docket Nos. G-13169, et al., *will hereafter be referred to under the lead docket, Docket No. G-13183, et al., Placid Oil Company, et al.* Appendix A attached hereto, contains a list of those dockets remaining in the original consolidation.

Appendix B contains a list of the proceedings which were severed from the original consolidation by notices issued on May 16, 17, 18 and 22, 1962.

Any participant wishing to receive documents, etc., filed in these matters by other participants in any of the proceedings listed in Appendices A and B, should sub-

[1] See Appendix A for a complete listing of Applicants and docket numbers remaining in the consolidated proceeding.

[2] See Appendix B for a complete list of Applicants and severed dockets.

mit a notice of desire for service no later than June 1, 1962, listing the specific dockets in which service is desired, and designating his representative to receive such service.

J. H. GUTRIDE
Joseph H. Gutride
Secretary

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APPENDIX A

Docket No.	
G-13183	Placid Oil Company
G-13184	Placid Oil Company
G-13197	Berkshire Oil Company (Formerly J. R. Frankel and R. R. Frankel)
G-13231	Pan American Petroleum Corporation
G-13232	Pan American Petroleum Corporation
G-13233	Pan American Petroleum Corporation
G-13356	Amerada Petroleum Corporation
G-13642	Socony Mobil Oil Company, Inc. (Formerly Republic Natural Gas Company)
G-13710	Sun Oil Company
G-13746	Socony Mobil Oil Company, Inc.
G-14109	Hassie Hunt Trust
G-14240	Diversa, Inc.
G-14244	Phillips Petroleum Company
G-14254	Sun Oil Company
G-14351	The Pure Oil Company
G-17337	J. Ray McDermott and Company, Inc.
G-17338	Kilroy Properties, Inc., *et al*

Docket No.

G-17340 Callery Properties, Inc.

G-17341 Callery Properties, Inc.

G-17342 Ocean Drilling and Exploration Company

G-17343 Ocean Drilling and Exploration Company, Operator, *et al*

G-17393 Amerada Petroleum Corporation

G-17396 Kerr-McGee Oil Industries, Inc.

G-17398 Sands, Caroline Hunt, *et al*

G-17399 Sid W. Richardson d/b/a Richardson & Bass, Operator, *et al*

G-17401 Socony Mobil Oil Company, Inc.

G-17402 Beck Oil Company, *et al*

G-17405 Phillips Petroleum Company

G-17407 Amerada Petroleum Corporation

G-17413 Mississippi River Fuel Corporation

G-17560 Shell Oil Company

G-17574 Pan American Petroleum Corporation

G-16540 Socony Mobil Oil Company, Inc. (Formerly Republic Natural Gas Company)

G-17381 Kerr-McGee Oil Industries, Inc.

G-17417 Pan American Petroleum Corporation

G-17444 Southern Natural Gas Company—Phillips Petroleum Company, Joint Venture

G-17447 Phillips Petroleum Company

G-16388 The Superior Oil Company

G-15122 Sun Oil Company

G-16380 The Superior Oil Company

APPENDIX B

Docket No.	
G-13169	Texaco Inc. (Formerly Texaco-Seaboard Inc.)
G-13219	The Atlantic Refining Company
G-13293	The California Company, a Division of The California Oil Company
G-13757	Newmont Oil Company
G-13758	Continental Oil Company
G-13973	Sohio Petroleum Company
G-14164	Austral Oil Company, Inc., Operator, Agent for Oil Participations, Inc.
G-14203	Union Oil Company of California
G-14227	Union Texas Petroleum, a Division of Allied Chemical Corporation (Formerly Union Texas Natural Gas Corporation)
G-14242	Austral Oil Company, Inc., Operator, Agent for Oil Participations, Inc.
G-14243	Austral Oil Company, Inc., Operator, Agent for Oil Participations, Inc.
G-14256	Humble Oil & Refining Company
G-14346	The Ohio Oil Company
G-14355	Cities Service Production Company
G-14356	Cities Service Production Company
G-14362	Union Oil Company of California
G-14385	Tidewater Oil Company
G-14604	Humble Oil & Refining Company

Docket No.	
G-14605	Humble Oil & Refining Company
G-14606	Humble Oil & Refining Company
G-14607	Humble Oil & Refining Company
G-17336	Texas Gas Exploration Corporation
G-17339	The California Company, a Division of The California Oil Company
G-17391	Humble Oil & Refining Company
G-17397	Bel Oil Corporation
G-17457	Union Oil Company of California
G-17463	Tidewater Oil Company
G-17474	Tidewater Oil Company
G-17475	Tidewater Oil Company
G-17483	Tidewater Oil Company
G-17554	Continental Oil Company
G-17566	Continental Oil Company
G-14753	Sunray DX Oil Company (Formerly Sunray Mid-Continent Oil Company)
G-16108	The California Company, a Division of The California Oil Company

5149

(Docketed May 25, 1962)

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Docket Nos. G-13183, et al.

PLACID OIL COMPANY, OPERATOR, et al.

Docket No. G-17413

MISSISSIPPI RIVER FUEL CORPORATION

Notice of Postponement of Hearing and Extension of Time to File Data

(May 25, 1962)

Upon requests filed by Pan American Petroleum Corporation and Staff Counsel for a postponement of the hearing now scheduled for May 29, 1962, by order issued March 7, 1962, as modified by notice issued March 27, 1962, in the above-designated matters, the hearing now scheduled for May 29, 1962, is hereby postponed to June 18, 1962, at 10:00 a.m., (EDST) in a hearing room of the Federal Power Commission, 441 G Street, N. W., Washington, D. C. Paragraph (D) of said order issued March 7, 1962 is amended accordingly.

Upon consideration of the motion filed by Mississippi River Fuel Corporation in Docket No. G-17413 for an extension of time within which to serve and file with the Commission such written testimony, exhibits, and arguments as it deems material to determination of the public interest initial price or prices in those remaining proceedings consolidated by order of March 7, 1962, a further extension is granted from May 18, 1962 to June 11, 1962, within which Mississippi River

Fuel Corporation may serve and file the data specified by Paragraph (C) of said order issued March 7, 1962. Paragraph (C) of said order issued March 7, 1962 is amended accordingly.

J. H. GUTRIDE
Joseph H. Gutride
Secretary

5165

(Docketed May 25, 1962)

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Docket No. G-13169, et al.

TEXACO-SEABOARD, INC., ET AL.

Docket No. G-13197

J. R. and R. R. FRANKEL (BERKSHIRE OIL COMPANY, SUCCESSOR)

Motion on Behalf of Berkshire Oil Company, J. R. Frankel and R. R. Frankel for Severance

Come now BERKSHIRE OIL COMPANY, J. R. and R. R. FRANKEL (hereinafter sometimes referred to collectively as "Berkshire") and show:

1. Under date of May 16, 1962, there was issued a notice that various of the proceedings in the above consolidated Dockets (particularly including the Matters of Continental Oil Company, Docket Nos. G-131758, G-17554, G-17556) had been severed from the consolidated proceedings in Texaco-Seaboard, Inc., et al., Docket Nos. G-13169, et al.

2. Berkshire has heretofore filed written testimony and exhibits in which it is shown that on April 16, 1962, effective as of November 2, 1961, the producing

properties situated in the North Thibodaux Field, Lafourche Parish, Louisiana, which are involved in Docket No. G-13197 (one of the above consolidated proceedings) were sold to Continental Oil Company, along with other properties, and that Berkshire no longer has any direct interest in these proceedings unless a retroactive refund obligation anterior to November 2, 1961, be imposed on Berkshire.

3. No question of the determination of rates for the future exists as to the Berkshire Docket (Docket G-13197). The only question involved in the Berkshire Docket will be the question of the extent, if any, to which retroactive rate condition may be imposed. It would be unduly burdensome to require Berkshire to participate in the lengthy procedures of the consolidated Dockets to protect this narrow issue.

4. Berkshire has filed herein the written testimony of M. Paul LeBlanc, together with exhibits showing the cost of service of Berkshire for a test

year ending September 30, 1959, which exhibits demonstrate a deficiency in revenues at the level of Berkshire's filed rates, and, *a fortiori*, a confiscatory deficiency under any lesser rate level.

5. Since the issue of the Berkshire Docket is narrowly restricted, since Berkshire is prepared to support the justness and reasonableness of its rates by cost of service evidence, and since it would be unduly burdensome to require Berkshire's participation in the contemplated lengthy hearings in the consolidated proceedings, it is appropriate that the matter of J. R. and R. R. Frankel

(Berkshire Oil Company, Successor) Docket No. G-13197, be severed from the consolidated proceedings.

Berkshire, therefore, respectfully moves the Commission for an order severing Docket No. G-13197 from the consolidated proceedings of Texaco-Seaboard, Inc., et al., Docket No. G-13169, et al.

H. H. Hillyer, Jr.
H. H. Hillyer, Jr.
1122 Whitney Building
New Orleans 12, Louisiana

Attorney for Berkshire Oil Company, J. R. Frankel and R. R. Frankel

5168

State of Louisiana
Parish of Orleans

Before Me, the the undersigned authority, personally appeared H. H. Hillyer, Jr., who, being by me first duly sworn, deposed and said:

That he is attorney for Berkshire Oil Company, J. R. Frankel and R. R. Frankel; that he prepared the above and foregoing Motion and that all statements of fact therein made are true and correct to the best of his knowledge, information and belief, and that he executed the same for and on behalf of his clients with full power and authority so to do.

H. H. Hillyer, Jr.

Sworn to and subscribed before
me this 24th day of May, 1962.

J. H. Phillips
(seal) *Notary Public*

5208

(Docketed June 4, 1962)

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Docket Nos. G-13183, et al.

PLACID OIL COMPANY, OPERATOR, et al.

Docket No. G-17402

BECK OIL COMPANY, et al.

Notice of Severance, Extension of Time and Postponement of Hearing

(June 4, 1962)

Upon consideration of the request filed by Applicant in the above-designated matter, notice is hereby given that Docket No. G-17402, Beck Oil Company, is hereby severed from the proceedings consolidated by order issued March 7, 1962, as modified by notice issued May 24, 1962, under the lead docket, Placid Oil Company, Operator, et al., Docket Nos. G-13183, et al.

An extension is hereby granted to the participant in the proceeding severed hereby to and including June 18, 1962 within which to serve and file data specified by Paragraph (C) of the Commission's order issued March 7, 1962; and that a hearing in the severed proceeding is scheduled to commence at 10:00 a.m., June 29, 1962, in a hearing room of the Federal Power Commission, 441 G Street N. W., Washington, D. C.

J. H. GUTRIDE
Joseph H. Gutride
Secretary

5211

(Docketed June 8, 1962)

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL POWER COMMISSION

	Docket Nos.
PLACID OIL COMPANY, *et al.*	G-13183, *et al.*
SHELL OIL COMPANY	G-17560

Staff Answer in Opposition to Motion for Severance

On June 1, 1962, Shell Oil Company filed a motion to sever Docket No. G-17560 (concerning certification of a sale to Hope Natural Gas Company) from the consolidated proceedings herein. Shell stated that it would shortly submit a settlement agreement in its rate proceeding (Docket Nos. G-9446, *et al.*) which would cover the rates at issue in Docket No. G-17560. (Docket No. G-17560 has not been consolidated with Shell's rate case, but under Section 5(a) of the Gas Act the rate case involves all of Shell's rates prospectively.)

On June 8, 1962, Shell submitted in Docket Nos. G-9446, *et al.* the proposed general rate settlement. Shell proposes to reduce its total price for the sale in Docket No. G-17560 to 20.625 cents per Mcf, to refund with interest two thirds of those monies collected which represent the difference between contract and settlement price, and to abstain from filing any change of rate (with one exception) until July 1, 1967, or establishment of an applicable area rate in excess of settlement price whichever event occurs earlier. Shell reserves the right, however, to make Section 4 filings under its contract tax reimbursement clause to reflect any change in Louisiana severance tax.

In the hearing in Docket Nos. G-13183 *et al.*, staff is urging, as to Shell's docket, reduction of the initial total

price to 20.0 cents per Mcf with full refunds but with no moratorium on Section 4 filings. Staff is willing to acquiesce in a settlement which allows the producer a higher certificated price and lesser refunds in exchange for a moratorium which substantially assures price stability as to the sale in question until final decision in the South Louisiana Area Proceeding (Docket No. AR61-2). But the threat of filings based on changes in Louisiana taxes will wreck such assurance. If filing is made to reflect increased taxes, current and proper practice requires suspension and institution of a full rate investigation into the justness and reasonableness of the increased rate in its entirety.

We have no way of predicting whether Louisiana will change its severance tax or whether Shell and Hope will change their contractual

tax reimbursement agreement. In our judgment, however, that possibility of a new Section 4 case makes the moratorium in the proposed settlement inadequate as to Docket No. G-17560; on such a moratorium the settlement's treatment of the price and refund issues is not in the public interest and severance of Docket No. G-1760 from these certificate proceedings is unwarranted and should be denied.

Respectfully submitted,

/s/ David J. Bardin
David J. Bardin
Staff Counsel

5213

(Docketed June 8, 1962)

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

	Docket Nos.
PLACID OIL COMPANY *et al.*	G-13183, G-13184 *et al.*

Presiding Examiner's Notice With Respect to Procedure for June 18 Session

(June 8, 1962)

By Notice dated May 25, 1962, the Secretary of the Commission postponed the hearing originally scheduled in this consolidated proceeding from May 29 to June 18, 1962. On May 14, 1962, the Chief Hearing Examiner issued a Ruling on Procedural Suggestions, in which he directed that the opening session would be devoted to the necessary procedural steps to be taken in connection with evidence offered by the parties, and to a discussion of the procedural aspects of the hearing.

In order to further place the parties on notice as to matters which will be considered and disposed of at the June 18 session, it is hereby directed as follows:

(1) All parties are to be prepared at the June 18 session to discuss the question whether individual producer cost of service-type evidence should be received in this proceeding in connection with the rate condition issue. In order to avoid needlessly repetitious argument on this matter, the producer-applicants will be expected to designate no more than two counsel to present arguments supporting the use of such evidence, and any intervenors desiring to oppose the use of such evidence will be expected to designate one counsel to present the general position.

In addition, Staff counsel will be expected to present the Staff's position on this matter. Fifteen minutes will be allocated for each counsel presenting an argument on this issue.

(2) In the event any party expects to object to any other portions of the evidence which has been previously distributed, he should be prepared to make such objection at the June 18 session, and any response thereto will be made at the same session.

(3) The interrogation of witnesses will commence on June 19, 1962. At the session commencing on this date there will be full cross-examination of all witnesses on evidence not connected with or related to individual producer cost of service-type evidence. In the event

a determination is made that individual producer cost of service-type evidence should be received in this proceeding, the Presiding Examiner will consider and determine at the June 18 session problems relating to the procedure which should be followed in dealing with this type of evidence, and the dates at which witnesses presenting this type of evidence shall be cross-examined.

(4) Under the circumstances outlined above, witnesses presenting testimony relating to individual producer cost of service-type evidence will not be required to be present during the week of June 18. However, all other witnesses will be expected to be available for cross-examination at the hearing session commencing on June 19, 1962.

JOSEPH ZWERDLING
Joseph Zwerdling
Presiding Examiner

5222

(Docketed June 11, 1962)

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

	Docket Nos.
PLACID OIL COMPANY *et al.*	G-13183, G-13184 *et al.*

Presiding Examiner's Supplemental Notice With Respect to Procedure for June 18 Session

(June 11, 1962)

In the event it should be determined that individual producer cost of service-type evidence should not be excluded *per se* in the instant proceeding, all parties should be prepared at the June 18 session to discuss whether cost of service-type evidence employing and reflecting methods or techniques which have clearly been rejected or discredited by the Commission in previous decisions should be excluded in this proceeding.

It is further requested that those parties taking the position that cost of service-type evidence of the latter character should be excluded shall prepare a summary list of those portions of the producer exhibits and of the proposed producer testimony which fall into this category—to be used in connection with motions to strike such testimony and in connection with exhibits or portions thereof to which objections will be made.

It is expected that preparations of this type will be fully completed prior to the June 18 session, so that prompt action may be taken at that session to implement any and all rulings which may be made with respect to the evidence previously distributed.

JOSEPH ZWERDLING
Joseph Zwerdling
Presiding Examiner

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(Docketed June 15, 1962)

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Docket Nos. G-13183, *et al.*
PLACID OIL COMPANY, OPERATOR, *et al.*

Docket Nos. G-13746, G-17401
SOCONY MOBIL OIL COMPANY, INC.

Docket Nos. G-13642, G-16540
SOCONY MOBIL OIL COMPANY, INC. (formerly Republic Natural Gas Company, *et al.*)

Docket Nos. G-13356, G-17393, G-17407
AMERADA PETROLEUM CORPORATION

Docket No. G-14240
DIVERSA, INC.

Notice of Severance and Postponement of Hearing

(June 15, 1962)

Upon consideration of the requests filed by Applicants in the above-designated matters, notice is hereby given that Docket Nos. G-13642, G-13746, G-16540, G-17401, G-13356, G-17393, G-17407, and G-14240, are hereby severed from the proceedings consolidated by order issued March 7, 1962, as modified by notice issued May 24, 1962, under the lead docket, Placid Oil Company, Operator, *et al.*, Docket Nos. G-13183, *et al.*

Take notice that a hearing in the severed proceedings is scheduled to commence at 10:00 a.m., June 29, 1962, in a hearing room of the Federal Power Commission, 441 "G" Street, N. W., Washington, D. C.

J. H. GUTRIDE
Joseph H. Gutride
Secretary

5272

(Docketed June 18, 1962)

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Docket Nos. G-13183, *et al.*
PLACID OIL COMPANY, OPERATOR, *et al.*

Docket Nos. G-13231, G-13232, G-13233, G-17417, G-17574
PAN AMERICAN PETROLEUM CORPORATION

Docket Nos. G-17381, G-17396
KERR-MCGEE OIL INDUSTRIES, INC.

Docket Nos. G-17444, G-17447
PHILLIPS PETROLEUM COMPANY

Notice of Severance and Postponement of Hearing

(June 18, 1962)

Upon consideration of the requests filed by Applicants in the above-designated matters, notice is hereby given that Docket Nos. G-13231, G-13232, G-13233, G-17417, G-17574, G-17381, G-17396, G-17444, and G-17447, are hereby severed from the proceedings originally consolidated by order issued March 7, 1962, under the lead docket "Texaco-Seaboard Inc., Docket No. G-13169, *et al.*", as modified by notice issued May 24, 1962, under the lead docket, "Placid Oil Company, Operator, *et al.*, Docket No. G-13183, *et al.*"

Take notice that hearings in the severed proceedings are scheduled to commence at 10:00 a.m., June 29, 1962, in a hearing room of the Federal Power Commission, 441 "G" Street, N. W., Washington, D. C.

GORDON M. GRANT
Gordon M. Grant
Acting Secretary

5273

(Docketed June 19, 1962)

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Docket Nos. G-13183, *et al.*
PLACID OIL COMPANY, *et al.*

ERRATA NOTICE

(June 19, 1962)

Notice of Severance and Postponement of Hearing

(Issued June 18, 1962)

1. Change line 4 of Caption as follows:
   Phillips Petroleum Company Docket No. G-17447

2. Add line 5 of Caption as follows:
   Joint Venture of Phillips Petroleum Company and Southern Natural Gas Company Docket No. G-17444

GORDON M. GRANT
Gordon M. Grant
Acting Secretary

5277

(Docketed June 20, 1962)

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Docket No. G-13183, *et al.*

PLACID OIL COMPANY, OPERATOR, *et al.*

Docket No. G-17405

PHILLIPS PETROLEUM COMPANY

Notice of Severance and Postponement of Hearing

(June 20, 1962)

Upon consideration of the request filed by Applicant in the above-designated matter, notice is hereby given that Docket No. G-17405 is hereby severed from the proceedings originally consolidated by order issued March 7, 1962, under the lead docket "Texaco-Seaboard Inc., Docket No. G-13169, *et al.*", as modified by notice issued May 24, 1962, under the lead docket, "Placid Oil Company, Operator, *et al.*, Docket No. G-13183, *et al.*"

Take notice that the hearing in the above-designated matter is scheduled to commence at 10:00 a.m., June 29, 1962, in a hearing room of the Federal Power Commission, 441 "G" Street, N. W., Washington, D. C.

J. H. GUTRIDE
Joseph H. Gutride
Secretary

5314

UNITED STATES OF AMERICA
BEFORE THE FEDERAL POWER COMMISSION

In the Matter of

Dockets Nos. G-13183, *et al.*
PLACID OIL COMPANY, *et al.*

Answer of the Superior Oil Company to Petition of Sun Oil Company for Issuance of Order Approving Offer of Settlement and Reissuance of Certificate of Public Convenience and Necessity

Now comes THE SUPERIOR OIL COMPANY (Superior), pursuant to Section 1.9 of the Rules of Practice and Procedure of this Commission, and answers the above petition of Sun Oil Company (Sun), likewise an applicant in this proceeding, as follows:

I.

Superior neither opposes nor supports the petition of Sun Oil Company for approval of the offer of settlement submitted with its above petition.

II.

Superior opposes the severance of Sun from this consolidated docket without respect to the disposition made of Sun's offer of settlement. In this connection Superior shows that the dockets of Sun Oil Company referred to specifically in the the petition to which answer is here made have by order of the Commission been consolidated with Superior's Docket Nos. G-16380 and G-16388. The basis of the order of consolidation dated March 7, 1962, i. e. common questions of law and fact, is not altered by potential elimination of

some of such questions through a proposed settlement and compromise. To the contrary, any settlement and compromise approved by this Commission will be most material in the consideration and disposition of the original common questions of law or fact, and should be a part of the consolidated record. This hearing having been held upon a consolidated record, Superior's rights will be prejudiced by a subsequent severance for disposition of one or more of the consolidated applications. Superior is entitled to have the complete disposition of all consolidated producers' applications continue to be a part of the original record for such use as may thereafter be desired.

By this answer Superior should not be understood as opposing any action the Commission may see fit to take in approving, or disapproving, the proposed offer of settlement of Sun, its objection going to severance of such action from the presently consolidated record.

Respectfully submitted,

THE SUPERIOR OIL COMPANY

/s/ H. W. VARNER
H. W. Varner
Attorney

Of Counsel:

H. W. VARNER
The Superior Oil Company
P. O. Box 1521
Houston 1, Texas

HOMER J. PENN
The Superior Oil Company
1725 K Street, N. W.
Washington 6, D. C.

5333

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

In the Matter of

Docket No. G-17413

MISSISSIPPI RIVER FUEL CORPORATION

Petition for Order Reissuing Permanent Certificate of Public Convenience and Necessity in Accordance With Application as Modified by Settlement Offer, and Request for Shortened Procedures Pursuant to Rule 1.32

5336

II

Mississippi respectfully shows that settlement on the terms of the attached form of Settlement Agreement is in the public interest for the following reasons:

1. Settlement on the proposed terms will be to the benefit of the parties to this proceeding, to the Commission, and to the ultimate consumer of natural gas in that much time, effort, and expense will be conserved and the delay which might otherwise result from protracted litigation in these proceedings will be eliminated.

2. The uncertainty as to the price to be charged will be removed, enabling Mississippi and Hope more efficiently to plan their operations, with resulting benefit to the public.

3. There is a postponement of five years from July 1, 1962 of price escalations, thus achieving price stability for a reasonable period of time.

4. The extension of the period within which gas paid for but not taken may be made up from a period of one year to a period of four years is of benefit to Hope and its customers by giving greater flexibility in operations and a longer period in which to make up gas which may not be taken.

5. Settlement of the questions of refunds on a mutually agreeable basis avoids the necessity of litigation on the legal questions involved and provides immediate benefit to the ultimate consumer.

WHEREFORE, Mississippi petitions the Commission for an order reissuing a permit certificate of public convenience and necessity according to the original application in the above-designated docket as supplementd, and as modified by the attached Settlement Agreement.

Respectfully submitted,

MISSISSIPPI RIVER FUEL CORPORATION

By CLEON L. BURT
Cleon L. Burt
Its Attorney

STATE OF MISSOURI }
COUNTY OF ST. LOUIS }

I, Cleon L. Burt, being duly sworn, depose that I am attorney for Mississippi River Fuel Corporation, a Delaware corporation, that I am authorized to execute the foregoing document, that I have read the same and know the contents thereof, and the facts set forth therein are true and correct to the best of my knowledge, information and belief.

CLEON L. BURT
Cleon L. Burt

Subscribed and sworn to before me this 28th day of September, 1962.

HELEN B. LAW
Notary Public

My Commission expires:
January 22, 1964.

(5338)

5338

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Docket No. G-17413

In the Matter of

MISSISSIPPI RIVER FUEL CORPORATION

Settlement Agreement

Mississippi River Fuel Corporation (Mississippi) agrees as follows:

5341

4. Within ninety days after the date of Commission approval of this settlement, Mississippi will refund to Hope an amount computed as follows:

The difference between the amount per Mcf actually collected for gas delivered under Mississippi's rate schedule involved herein and the settlement price of 20.625 cents per Mcf will be multiplied by the volumes delivered in June, 1962, and by the volumes delivered in each successive prior month until a dollar amount has been computed which is equal to two-thirds of the difference between the amounts paid to Mississippi by Hope for gas delivered from the date of initial delivery and the amounts that would have been due had a rate of 20.625 cents per Mcf prevailed during the entire period. Interest upon said amounts refunded shall be paid at the rate of six percent per annum as to volumes delivered before March 1, 1960, and seven percent per annum as to volumes delivered after that date. No interest shall accrue after October 1, 1962.

As to volumes delivered to Hope from July 1, 1962 to the date, following Commission approval hereof, when collections actually commence at the settlement rate of 20.625 cents per Mcf, Mississippi will refund to Hope

5342

the full difference between the amounts paid to Mississippi by Hope for such volumes and the amount which would have been paid at a rate of 20.625 cents per Mcf, with interest thereon at the rate of seven percent per annum. No interest shall accrue after October 1, 1962.

5. Upon the issuance of an order by the Commission approving this Settlement Agreement, Mississippi agrees promptly to file as a supplement to its FPC Gas Rate Schedule No. 14 a true copy of this Settlement Agreement together with the order of the Commission approving same. Upon the acceptance for filing of such supplement and the reissuance of a permanent certificate of public convenience and necessity by the Commission to Mississippi in the aforesaid docket according to the original application as supplemented, and as modified by the terms of this Settlement Agreement, the terms of the original rate schedule of Mississippi as it may heretofore have been amended or supplemented shall be amended only to the extent that the terms and provisions of this Settlement Agreement are inconsistent with the terms and provisions of the original rate schedule as heretofore amended or supplemented. In all other respects the terms

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and provisions of the original rate schedule, as heretofore amended or supplemented, and the rights and obligations of the parties thereto, shall be unaffected by this Agreement. For example, the rate schedule provision that buyer shall transport certain liquids, either separately or along with the gas stream, shall be unaffected by this Agreement.

6. It is understood that nothing contained in this Settlement Agreement shall be construed to limit in any way the position of any party to this proceeding in any other proceeding.

7. The consideration for this Settlement Agreement i the settlement of the issues involved in Docket No. G-1741 This Agreement shall be effective as of July 1, 1962, subjec to Federal Power Commission's reissuance of a permanen certificate of public convenience and necessity to Missis sippi in said docket in accordance with the original appli cation as supplemented and as modified by this Settlemen Agreement.

Executed this 28th day of September, 1962, at St. Louis Missouri.

MISSISSIPPI RIVER FUEL CORPORATION

By CLEON L. BURT
Cleon L. Burt
Its Attorney

5365

Received Oct. 15, '62

BEFORE THE
FEDERAL POWER COMMISSION

Docket Nos. G-13710, G-14254 and G-15122

In the Matters of

SUN OIL COMPANY

Amended Offer of Settlement

Comes now Sun Oil Company (Sun) and hereby offers to settle the above-entitled proceedings on the following terms:

5370

4. Sun's contracts with Transco provide that Transco shall have the right to make up gas paid for but not taken during any calendar year by taking during the next two succeeding calendar years, under Sun's FPC Gas Rate

Schedule 92, and the next five succeeding calendar years under Sun's FPC Gas Rate Schedule No. 101. As a part of this settlement proposal, Sun agrees to extend the make-up period with respect to its FPC Gas Rate Schedule 92 to four years in lieu of two years. Sun's contract with United under its FPC Gas Rate Schedule 114 provides for a make-up period of two years. As a part of this settlement proposal, Sun agrees to extend this make-up period to four years in lieu of two years.

5. Within ninety days after the date of Commission approval of this settlement proposal, Sun will refund to United the amount determined in accordance with (a) below, and Sun will refund to Transco the amounts determined in accordance with (b) below.

(a) The difference between the amount per Mcf actually collected for gas delivered and for gas paid for but not yet delivered under Sun's FPC Gas Rate Schedule 114 and the settlement price of 20.625 cents will be multiplied by the volumes delivered or paid for in June, 1962, and by those delivered or paid for in each successive prior month until a dollar amount has been computed which is equal to two-thirds of the difference between the amounts paid to

Sun by United from the date of initial delivery and the amounts that would have been due had the settlement price of 20.625 cents per Mcf prevailed during each such month. Interest upon said amounts refunded shall be paid at the rate of six percent per annum as to volumes delivered before March 1, 1960, and seven percent per annum as to volumes delivered and for gas paid for but not yet delivered after that date. No interest shall accrue after July 1, 1962, but any amounts collected by Sun for gas delivered subsequent to that date in excess of the amounts which would have been collected under the settlement price

of 20.625 cents per Mcf shall be refunded, in addition to and at the same time as, the dollar amounts of principal and interest provided for above.

(b) (i) The difference between the amount per Mcf actually collected for gas delivered under Sun's FPC Gas Rate Schedule 92 and the settlement price of 20.625 cents per Mcf, will be multiplied y the volumes delivered in June, 1962, and by those delivered in each successive prior month until a dollar amount has been computed which is equal to two-thirds of the difference between the amounts paid to Sun by Transco from the date of initial delivery and the amounts that would have been due had the settlement price of 20.625 cents per Mcf prevailed during each such month. Interest upon said amounts refunded shall be paid at the rate of six percent per annum as to volumes delivered before March 1, 1960, and seven percent per annum as to volumes delivered after that date. No interest shall accrue after July

1, 1962, but any amounts collected by Sun for gas delivered subsequent to that date in excess of the amounts which would have been collected under the settlement price of 20.625 cents per Mcf shall be refunded, in addition to and at the same time as, the dollar amounts of principal and interest provided for above.

(b)(ii) The difference between the amount per Mcf actually collected for gas delivered under Sun's FPC Gas Rate Schedule 101 and the settlement price of 19.0 cents per Mcf, will be multiplied by the volumes delivered in June, 1962, and by those delivered in each successive prior month until a dollar amount has been computed which is equal to two-thirds of the difference between the amounts paid to Sun by Transco for gas delivered from the date of initial delivery and the amounts that would have been due

had the settlement price of 19.0 cents per Mcf prevailed during each such month. Interest upon said amounts refunded as set forth above shall be paid at the rate of six percent per annum as to gas delivered before March 1, 1960, and seven percent per annum as to gas delivered after that date. No interest shall accrue after July 1, 1962, but any amounts collected by Sun for gas delivered subsequent to that date in excess of the amounts which would have been collected under the settlement price of 19.0 cents per Mcf shall be refunded, in addition to and at the same time as, the dollar amounts of principal and interest provided for above. With reference to

the contract set forth in Sun's FPC Gas Rate Schedule No. 101, Transco has paid Sun for gas it has been unable to take, as required by the take-or-pay-for provisions of the contract. Sun shall refund, as to such take-or-pay-for payments and over the life of the contract, a volume of gas attributable to the difference between the settlement price of 19.0 cents per Mcf and the contract price of 21.4 cents per Mcf. The volume of such refund gas shall be calculated at the price or prices prevailing at the time delivered, and no interest shall be charged. In all other respects, the provisions of the contract pertaining to quantity (Article VI) shall be unaffected.

6. Upon the issuance of an order by the Commission approving this Offer of Settlement, Sun agrees promptly to file as supplements to its FPC Gas Rate Schedules involved herein, true copies of this Offer of Settlement together with the order of the Commission approving same. Upon acceptance for filing of such supplements and the reissuance of permanent certificates of public convenience and necessity by the Commission to Sun in the above-entitled proceedings according to their original applications as modi-

fied by the terms of this Offer of Settlement, the terms of the original rate schedules of Sun as they may have been heretofore amended or supplemented shall be amended only only to the extent that the terms and provisions of this Offer of Settlement are inconsistent with the terms and

provisions of the original rate schedules as heretofore amended or supplemented. In all other respects the terms and provisions of the original rate schedules, as heretofore amended or supplemented, and the rights and obligations of the parties thereto, shall be unaffected by this Offer of Settlement.

7. It is understood that nothing contained in this Offer of Settlement shall be construed to limit Sun's position in any other proceeding before the Federal Power Commission, and if it should not be accepted by all parties and approved by the Federal Power Commission, nothing herein shall be binding upon Sun as an admission against interest or be taken in derogation of any position now maintained by Sun in any pending proceeding or litigation, including the above-captioned dockets.

8. This Offer of Settlement shall be effective as of July 1, 1962, subject to the Federal Power Commission's approval thereof.

* * * * * * * * * * *

5386

Docketed Nov 14 1962

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners:

Joseph C. Swidler, *Chairman;* Howard Morgan, L. J. O'Connor, Jr., Charles R. Ross, and Harold C. Woodward.

Docket Nos. G-13183, *et al.*
G-13710, G-14254, G-15122

PLACID OIL COMPANY, *et al.*
SUN OIL COMPANY

Order Approving Offer of Settlement Severing Proceedings and Conditionally Reissuing Permanent Certificates of Public Convenience and Necessity

(Issued November 14, 1962)

Sun Oil Company has filed a proposed settlement of the controversies attendant to certificate applications in its above-captioned proceedings. These proceedings were remanded to us as a result of judicial review of certificate orders issued on September 4, 1958, and August 10, 1959. *Transcontinental Gas Pipe Line Corp.,* 20 FPC 264, remanded, *P.S.C. of N. Y.* v. *F.P.C.,* 361 U.S. 195; *Sun Oil Company,* 22 FPC 351, remanded, *United Gas Improvement Co.* v. *F.P.C.,* 290 F.2d 133 (CA5), cert. den. 368 U.S. 823. They have been consolidated with other remanded south Louisiana certificate cases in *Placid Oil Company, et al.* (Docket Nos. G-13183, *et al*). Those consolidated proceedings have been heard, but still await decision by the Presiding Examiner.

Sun filed its proposal on September 18, 1962. A number of parties[1] filed answers suggesting revisions in Sun's proposal. On October 15, 1962, Sun filed an amended offer of settlement reflecting the substance of all the suggested revisions but one, which was formally withdrawn after clarifying negotiations. On September 26, 1962, the Superior Oil Company, another applicant in *Placid Oil Company, et al. supra* (but not a party to any of Sun's proceedings), filed an answer to Sun's proposal objecting to "the severance of Sun from this consolidated docket". Superior's answer fails to demonstrate any basis for its claims of prejudice, and its objections are without merit. No party objects to Sun's proposal, which may be summarized as follows.

Docket No.	R.S. No.	Settlement Price	Buyer
G-13710	92	20.625¢ McF	Transcontinental Gas Pipe Line Corp.
G-14254	101	19.0	Transcontinental Gas Pipe Line Corp.
G-15122	114	20.625	United Gas Pipe Line Company

Sun's proposal is patterned upon and in accordance with other settlements which we very recently approved in *Texaco Inc.*, 28 FPC (order issued July 30, 1962, in Docket Nos. G-13169, *et al.*). It provides for immediate rate reductions; for the two-thirds refund formula approved by us in *Texaco, supra*, as to periods prior to July 1,

[1] Transcontinental Gas Pipe Line Corporation, Long Island Lighting Company, *et al.*, Consolidated Edison Company of New York, Inc., and United Gas Pipe Line Company.

1962; and for 100 percent refunds for the period since July 1, 1962. As a further feature of the settlement proposal Sun will withdraw its increased rate filing in Docket No. RI62-483.

We find the proposed settlement to be in the public interest for the reasons we stated in *Texaco, supra,* and without reference to the record upon rehearing in these proceedings. Accordingly it is necessary and appropriate that we sever the dockets of Sun from Docket Nos. G-13183, *et al.,* pass on the merits of the settlement proposals, and thereby promptly establish the reduced purchase price under the affected rate schedules. No party has objected to waiver of intermediate decision in these proceedings.

The Commission further finds:

(1) Sun Oil Company (the applicant) is a natural-gas company within the meaning of the Natural Gas Act, as heretofore found, and is engaged in the sale of natural gas in interstate commerce for resale for ultimate public consumption, subject to the jurisdiction of the Commission.

(2) The sales of natural gas proposed by Sun's applications, as amended, are subject to the jurisdiction of the Commission, and such sales, together with the construction and operation of any facilities subject to the jurisdiction of the Commission necessary therefor, are subject to the requirements of subsections (c) and (e) of Section 7 of the Natural Gas Act.

(3) Sun is able and willing properly to do the acts and to perform the services proposed, and to conform to the provisions of the Natural Gas Act and the requirements, rules and regulations of the Commission thereunder.

(4) The sales proposed by Sun in the above-captioned dockets, together with the construction and operation of any

facilities subject to the jurisdiction of the Commission and necessary therefor, are required by the public convenience and necessity and are in the public interest upon the conditions set forth below, and certificates should be issued as ordered below effective as of the date of initial delivery.

(5) The conditions attached to the certificates herein issued are required by the public convenience and necessity.

The Commission further orders:

(A) The proceedings in Docket Nos. G-13710, G-14254, and G-15122 are severed from those in Docket Nos. G-13183 *et al.*, and the intermediate decision procedure is waived in the severed proceedings.

(B) Certificates of public convenience and necessity are hereby re-issued upon the conditions set forth herein, to Sun, effective as of the dates of initial delivery, for the sale of natural gas in interstate commerce for resale as proposed, and for the construction and operation of any facilities subject to the jurisdiction of the Commission necessary therefor, as more fully described in the applications.

(C) The certificates issued by paragraph (B), above, are granted upon the express condition that applicant fully comply with the terms of the amended offer of settlement, which is expressly approved.

(D) Within 30 days after making the refunds required by the terms and conditions of this order and the settlement proposed, Sun shall report to the Commission, in writing and under oath, the amount of the refunds made to each of its purchasers, showing separately the amount of principal and interest so paid and the bases used for such determinations, together with releases from its pur-

chasers showing receipt of the refunds in conformity to the settlement as approved.

(E) Upon full compliance of Sun with all the terms of this order and of the settlement proposal, applicant shall be relieved of any further refund obligations in these proceedings and said proceedings shall terminate.

(F) The certificates herein issued are not transferable and shall be effective only so long as the applicant continues the acts and operations hereby authorized in accordance with the provisions of the Natural Gas Act and the applicable rules, regulations and orders of the Commission.

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(G) The grant of the certificates herein shall not be construed as a waiver of the requirements of Section 4 of the Natural Gas Act, or of Part 154 of the Regulations thereunder; *provided, however,* that the 30-day notice provision of Part 154.94(b) and the detailed submittal requirements of Part 154.94(e) are hereby waived insofar as they apply to the filing of reductions in rate as required by this order and the settlement proposal.

(H) The grant of certificates herein and approval of the settlement proposal is without prejudice to any findings or orders which have been or may hereafter be made by the Commission in any proceeding now pending on hereafter instituted by or against applicant, particularly any proceeding under Section 5 of the Natural Gas Act or Section 5(c) of the Outer Continental Shelf Lands Act, and is without prejudice to claims or contentions which may be made by the Commission, applicant, the Commission staff, or any affected party herein in any other proceeding.

By the Commission.

Joseph H. Gutride,
Secretary.

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Docketed Nov 30 1962

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners:

Joseph C. Swidler, Chairman; Howard Morgan, L. J. O'Connor, Jr., Charles R. Ross, and Harold C. Woodward.

Docket Nos. G-13183, *et al.*
Docket No. G-17413

PLACID OIL COMPANY, *et al.*
MISSISSIPPI RIVER FUEL CORPORATION

Order Approving Offer of Settlement Severing Proceedings and Conditionally Reissuing Permanent Certificate of Public Convenience and Necessity

(Issued November 30, 1962)

Mississippi River Fuel Corporation has filed a proposed settlement of the controversies regarding its judicially remanded certificate application in Docket No. G-17413. See *Texas Gas Transmission Corp.*, 22 FPC 378; remanded *sub nom. Public Service Commission of New York* v. *F.P.C.*, 287 F.2d 146 (CADC), cert. denied 365 U.S. 880. Mississippi's application has been consolidated with other remanded south Louisiana certificate cases in *Placid Oil Company, et al.*, (Docket Nos. G-13183, *et al.*). Mississippi filed its proposal on October 1, 1962, after those consolidated proceedings had been heard, prior to decision by the Presiding Examiner. The proposal calls for a settlement price of 20.625 cents per Mcf to Hope Natural Gas Company under Mississippi's Rate Schedule No. 14. It also provides for refunds and a moratorium on increased rates.

No party objects to the substance of Mississippi's proposal; however, on November 2, 1962, the New York Public Service Commission (PSC) filed a response which points out a possible problem of construction. Mississippi's proposed moratorium provision includes the sentence: "The price will be subject to escalation to the applicable contract price o nor after July 1, 1967, but Mississippi will file no such escalation to be effective prior to that date." PSC says this sentence may be construed to permit Mississippi to file an increased rate prior to July 1, 1967, to take account of the rate suspension provisions of the Natural Gas Act and that, if so construed, it would be inconsistent with the moratorium provisions of similar settlements approved by us in *Texaco Inc.*, 28 FPC (order issued July 30, 1962, in Docket Nos. G-13169, *et al.*). We agree with PSC that any settlement in this docket should accord with those approved in *Texaco Inc., supra;* but we are convinced that Mississippi's proposal should not be construed in the manner PSC fears. In submitting its settlement proposal, Mississippi stated that it "substantially conforms to settlements heretofore approved" in *Texaco Inc., supra.* Accordingly, we conformably construe Mississippi's proposal as intended to "proscribe increased rate filings until July 1, 1967" provided,

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however, "that filings may be made prior to July 1, 1967, to the extent that Congress extends the suspension period" to exceed the present five-month maximum. Mississippi's moratorium on rate filings is, of course, subject to the same exception based on the outcome of the Area Rate Proceeding in Docket No. AR61-2 as were the settlements approved in *Texaco Inc., supra.*

We find the proposed settlement to be in the public interest for the reasons we stated in *Texaco, Inc., supra,*

and without reference to the record upon rehearing in this proceeding. Accordingly it is necessary and appropriate that we sever Docket No. G-17413 from Docket Nos. G-13183, *et al.*, pass on the merits of the settlement proposal, and thereby promptly establish the reduced purchase price under the affected rate schedule. No party has objected to waiver of intermediate decision in this proceeding.

The Commission further finds:

(1) Mississippi River Fuel Corporation (the applicant) is a natural-gas company within the meaning of the Natural Gas Act, as heretofore found, and is engaged in the sale of natural gas in interstate commerce for resale for ultimate public consumption, subject to the jurisdiction of the Commission.

(2) The sales of natural gas proposed by Mississippi's application, as amended, are subject to the jurisdiction of the Commission, and such sales, together with the construction and operation of any facilities subject to the jurisdiction of the Commission necessary therefor, are subject to the requirements of subsections (c) and (e) of Section 7 of the Natural Gas Act.

(3) Applicant is able and willing properly to do the acts and to perform the services proposed, and to conform to the provisions of the Natural Gas Act and the requirements, rules and regulations of the Commission thereunder.

(4) The sales proposed by applicant in the above-captioned docket, together with the construction and operation of any facilities subject to the jurisdiction of the Commission and necessary therefor, are required by the public convenience and necessity and are in the public interest upon the conditions set forth below, and a certificate should be issued as ordered below effective as of the date of initial delivery.

(5) The conditions attached to the certificate herein issued are required by the public convenience and necessity.

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The Commission further orders:

(A) The proceeding in Docket No. G-17413 is severed from those in Docket Nos. G-13183, *et al.*, and the intermediate decision procedure is waived in the severed proceeding.

(B) A certificate of public convenience and necessity is hereby reissued upon the conditions set forth herein, to applicant, effective as of the date of initial delivery, for the sale of natural gas in interstate commerce for resale as proposed, and construction and operation of any facilities subject to the jurisdiction of the Commission necessary therefor, as more fully described in the application.

(C) The certificate issued by paragraph (B), above, is granted upon the express condition that applicant fully comply with the terms of its settlement proposal, as herein construed, which proposal is expressly approved.

(D) Within 30 days after making the refunds required by the terms and conditions of this order and the settlement proposal, applicant shall report to the Commission, in writing and under oath, the amount of the refunds made to its purchaser, showing separately the amount of principal and interest so paid and the bases used for such determinations, together with a release from its purchaser showing receipt of the refunds in conformity to the settlement as approved.

(E) Upon full compliance of applicant with all the terms of this order and of the settlement proposal, applicant shall be relieved of any further refund obligations in this proceeding and said proceeding shall terminate.

(F) The certificate herein issued is not transferable and shall be effective only so long as the applicant continues the acts and operations hereby authorized in accordance with the provisions of the Natural Gas Act and the applicable rules, regulations and orders of the Commission.

(G) The grant of the certificate herein shall not be construed as a waiver of the requirements of Section 4 of the Natural Gas Act, or of Part 154 of the Regulations thereunder; *provided, however,* that the 30-day notice provision and the detailed submittal requirements of Part 154 are hereby waived insofar as they apply to the filing of reductions in rate as required by this order and the settlement proposal.

(H) The grant of a certificate herein and approval of the settlement proposal is without prejudice to any findings or orders which have been or may hereafter be made by the Commission in any proceeding now pending

or hereafter instituted by or against applicant, particularly any proceeding under Section 5 of the Natural Gas Act or Section 5(c) of the Outer Continental Shelf Lands Act, and is without prejudice to claims or contentions which may be made by the Commission, applicant, the Commission staff, or any affected party herein in any other proceeding. proceeding.

By the Commission.

Joseph H. Gutride,
Secretary.

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Docketed Dec 6 1962

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners:

Joseph C. Swidler, Chairman; Howard Morgan, L. J. O'Connor, Jr., Charles R. Ross, and Harold C. Woodward.

Docket Nos. G-13183, *et al.*
PLACID OIL COMPANY, *et al.*

Docket No. G-14351
THE PURE OIL COMPANY

Order Severing Proceeding and Conditionally Reissuing Permanent Certificate of Public Convenience and Necessity

(Issued December 6, 1962)

By order issued November 27, 1962, in The Pure Oil Company, *et al.*, Docket Nos. G-16790, *et al.*, we passed upon the settlement proposal filed by Pure on September 19, 1962, as amended on November 5, 1962. This order effectuates our approval of the Pure Settlement insofar as it concerns Pure sales to Transcontinental Gas Pipe Line Corporation under Rate Schedule No. 39, such sales being the subject of a judicially-remanded proceeding upon Pure's certificate application in Docket No. G-14351. See *Transcontinental Gas Pipe Line Corp.*, 20 FPC 264, remanded, *P.S.C. of N.Y.* v. *F.P.C.*, 361 U.S. 195. Pure's application has been consolidated with other remanded south Louisiana certificate cases in *Placid Oil Company, et al.* (Docket Nos. G-13183, *et al.*) which await decision by the Presiding Examiner.

Pure's amended settlement proposal as to its Rate Schedule No. 39 is patterned upon and in accordance with other approved settlements in related certificate dockets formerly consolidated with *Placid Oil Company, et al., supra.* See *Texaco Inc.*, 28 FPC (order issued July 30, 1962 in Docket Nos. G-13169, *et al.*). Accordingly, it is necessary and appropriate that we sever Docket No. G-14351 from Docket Nos. G-13183, *et al.*, and reissue a conditioned permanent certificate in accordance with the settlement we have approved.

The Commission further finds:

(1) The Pure Oil Company (the applicant) is a natural-gas company within the meaning of the Natural Gas Act, as heretofore found, and is engaged in the sale of natural gas in interstate commerce for resale for ultimate public consumption, subject to the jurisdiction of the Commission.

(2) The sales of natural gas proposed by Pure's application, as amended, are subject to the jurisdiction of the Commission, and such sales, together with the construction and operation of any facilities subject to the jurisdiction of the Commission necessary therefor, are subject to the requirements of subsections (c) and (e) of Section 7 of the Natural Gas Act.

(3) Applicant is able and willing properly to do the acts and to perform the services proposed, and to conform to the provisions of the Natural Gas Act and the requirements, rules and regulations of the Commission thereunder.

(4) The sales proposed by applicant in the above-captioned docket, together with the construction and operation of any facilities subject to the jurisdiction of the Commission and necessary therefor, are required by the public

convenience and necessity and are in the public interest upon the conditions set forth below, and a certificate should be issued as ordered below effective as of the date of initial delivery.

(5) The conditions attached to the certificate herein issued are required by the public convenience and necessity.

The Commission further orders:

(A) The proceeding in Docket No. G-14351 is severed from those in Docket Nos. G-13183, *et al.*, and the intermediate decision procedure is waived in the severed proceeding.

(B) A certificate of public convenience and necessity is hereby reissued upon the conditions set forth herein, to applicant, effective as of the date of initial delivery, for the sale of natural gas in interstate commerce for resale as proposed, and construction and operation of any facilities subject to the jurisdiction of the Commission necessary therefor, as more fully described in the application.

(C) The certificate issued by paragraph (B), above, is granted upon the express condition that applicant fully comply with the terms of its settlement proposal, as amended; of this order; and of the order issued November 27, 1962, in the *Pure Oil Company,* Docket Nos. G-16790, *et al.,* particularly ordering paragraphs (D) and (E) thereof.

(D) Upon full compliance of applicant with all the terms of these orders and of the amended settlement proposal, applicant shall be relieved of any further refund obligations in this proceeding and said proceeding shall terminate.

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(E) The certificate herein issued is not transferable and shall be effective only so long as the applicant continues the

acts and operations hereby authorized in accordance with the provisions of the Natural Gas Act and the applicable rules, regulations and orders of the Commission.

(F) The grant of the certificate herein shall not be construed as a waiver of the requirements of Section 4 of the Natural Gas Act, or of Part 154 of the Regulations thereunder.

By the Commission.

Joseph H. Gutride,
Secretary.

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Docketed Dec 7 1962

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Filed Office of the Secretary Dec 7 9.17 AM '62

Decision

	Docket Nos.
Placid Oil Company	G-13183
Placid Oil Company	G-13184
Berkshire Oil Company (formerly J. R. Frankel and R. R. Frankel)	G-13197
Hassie Hunt Trust	G-14109
Phillips Petroleum Company	G-14244
The Superior Oil Company	G-16380
The Superior Oil Company	G-16388
J. Ray McDermott and Company, Inc.	G-17337
Kilroy Properties, Inc., *et al.*	G-17338
Callery Properties, Inc.	G-17340
Callery Properties, Inc.	G-17341
Ocean Drilling and Exploration Co.	G-17342
Ocean Drilling and Exploration Co., Operator, *et al.*	G-17343
Sands, Caroline Hunt, *et al.*	G-17398
Sid W. Richardson d/b/a Richardson & Bass, Operator, *et al.*	G-17399
Shell Oil Company	G-17560

UPON APPLICATIONS FOR CERTIFICATES OF PUBLIC CONVENIENCE AND NECESSITY

(Issued December 7, 1962)

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5434-5436

APPEARANCES

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ZWERDLING, *Presiding Examiner:* These proceedings involve twenty-one producer certificate cases which are before the Commission upon remand as the result of judicial review proceedings.[1] In such judicial proceedings the

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courts set aside prior Commission orders granting unconditioned permanent certificates to the instant producer applicants under Section 7(c) of the Natural Gas Act, for sales of natural gas to Transcontinental Gas Pipe Line Corporation (Transco), Hope Natural Gas Company (Hope), and United Gas Pipe Line Company (United) from leases offshore and onshore Louisiana—at initial contract prices ranging from 21.40 cents, involving no tax reimbursement, to 23.8 cents per Mcf, including tax reimbursement.[2] The contracts in question were executed in 1957 and 1958, and deliveries commenced in 1959.[3] The various applications

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[1] Since the conclusion of the instant hearing, a number of these producer applicant have submitted offers of settlement to the Commission. Offers of settlement have been approved by the Commission as to Sun Oil Company, The Pure Oil Company, and Mississippi River Fuel Corporation, and their respective dockets have been severed, or will shortly be severed from the instant consolidated proceeding. Those dockets have accordingly ben dropped from the entitlement of this case.

[2] At 15.025 psia.

[3] With the exception of the Sun Oil Company sale to United in Docket G-15122, as to which deliveries commenced in February 1960.

here involved were originally consolidated into and heard in five groups, whose prior history is summarized in Appendix A to this decision.

The only controverted issue in this case is that of the proper public interest initial price or prices applicable to these sales, and the related question of whether refunds should be required in the event a rate condition is imposed.

The Commission originally consolidated these remanded and reopened proceedings for hearing with Docket No. AR61-2, the Southern Louisiana area rate proceeding. By order issued January 10, 1962 in *Texaco-Seaboard Inc., et al.*, Docket Nos. G-13169, *et al.*,[4] the Commission confirmed that initial prices at the levels proposed in the instant dockets

> "are out of line and cannot be approved unless justified by compelling evidence after full hearing; such evidence has not been adduced to date." (mimeo order, p. 2)

The Commission further concluded that it would be fairer and wiser under the circumstances to offer the instant applicants a further opportunity to adduce evidence in Docket Nos. AR61-2, *et al.*, in support of their proposed prices. However, in order to provide the public with some interim protection the Commission directed that the amounts collected by the applicants

> "shall be subject to such refund provisions as the Commission may lawfully prescribe by its final order in these proceedings . . . to the extent, if any, that the rate which has been collected exceeds the rate ultimately found to accord with the requirements of the public convenience and necessity." (mimeo order, p. 4)

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[4] The original entitlement of the consolidated proceeding prior to orders severing a number of the consolidated dockets.

Subsequently, numerous parties filed applications for rehearing of this order, attacking (among other things) the validity of the refund obligation therein imposed. On March 7, 1962 the Commission issued an Order Denying Rehearing, but laid down new procedures for the handling of the instant applications "designed to abbreviate the duration of applicants' refund uncertainties." In this order the Commission concluded that the unconditioned certificates previously issued to these producer applicants

> "were erroneously issued in the first place and as a result of the invocation of Section 19 have never assumed finality. . . . The courts have lain bare the errors, it remains our task equitably to correct them. . . . we have concluded that our 1958 order was erroneous, that the record does not show the price proposals of the producers to be in the public interest, and that the record shows, rather, that the proposed prices are out of line." (mimeo order, pp. 2-3)

Although the Commission adhered to its earlier position that the producer applicants should be afforded further opportunity to be heard, it concluded that the initial price question in these cases should not be left to abide the outcome of the Area Rate proceeding, stating:

> "We are anxious to expedite final resolution of proceedings which have already been heard and decided once, but which remain on our docket by virtue of Section 19 of the Act. We are also impressed by representations as to the practical problems posed by continuing pendency of these proceedings. As several producers observe, the uncertainties as to these initial prices complicate settlements with royalty owners and interfere with prudent budgeting and other financial matters. We are convinced that such uncertainties can quickly be dispelled in these proceedings as a result of the 'ground rules,' established by our recent *Catco* opinion, for certificate cases originally heard prior to

issuance of our General Policy Statement." (mimeo order, p. 5)

Accordingly, the Commission severed the instant dockets from Docket No. AR61-2 and consolidated them for the limited purpose of determining the public interest initial price or prices applicable to such severed and consolidated proceedings.

Hearing in the instant severed and consolidated proceedings commenced on June 19, 1962 and concluded on June 22, 1962. Final briefs were filed by September 4, 1962 and the case is now ready for decision.

The producer applicants request approval of the initial contract prices, and object to the imposition of any price condition. The Commission

Staff contends that the proper in-line public interest price to be applied here is the same as that determined in *CATCO*, Op. No. 351, 27 F.P.C. 96—*i.e.*, 18.5 cents per Mcf, plus applicable tax reimbursements. However, with respect to five of the instant applications involving sales to Transco (Docket Nos. G-13183, 13184, 13197, 13710 and 14109), the Staff recommends that a 16-cent "triggering line" (plus applicable tax reimbursements) be fixed as the appropriate initial price. Interveners The United Gas Improvement Company (UGI) and Philadelphia Electric Company contend that the price line found applicable by the Commission in *CATCO, supra*, is, by definition, applicable to the post-CATCO sales in the instant proceeding; that accordingly the proper in-line price to be applied here is 18.5 cents per Mcf, plus an additional 1.5 cents per Mcf for gas produced in any area subject to the taxing authority of the State of Louisiana. The Public Service Commission of the State of New York (PSC) contends that the proper in-line price to

be applied here is 18 cents per Mcf, including tax reimbursement, and 16 cents or 17 cents excluding tax—these being the same initial prices for which it unsuccessfully contended in *CATCO, supra.*

I. ECONOMIC AND FINANCIAL EVIDENCE

At the outset of the proceeding the instant producer applicants offered in evidence a tremendous mass of cost-type, economic and financial evidence—consisting of approximately 70 exhibits and the testimony of 35 witnesses. This evidence, although taking a large variety of different forms, may be characterized roughly as falling generally into three basic categories, as follows:

1) *Cost of service studies* of various types. It may be noted that substantial portions of this evidence were defective in that they employed methods and techniques inconsistent with those previously adopted by the Commission in *Phillips,* Op. No. 338, and *CATCO,* Op. No. 351.[5]

2) A number of *discounted cash flow studies,* similar to the one rejected by the Commission in *CATCO,* Op. No. 351.

3) *Economic trend data studies* of various types, setting forth data related to drilling trends and costs, data related to supply, demand, revenues and profits, and market trend data.

Certain of these studies were identical in nature with similar studies which the Commission in the *El Paso* certificate case, *El Paso Natural Gas Co., et al.,* Op. No. 358 (June 11, 1962), found to have "no real probative value." (Op No. 358, pp. 4 and 6)

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[5] A detailed analysis of such defects is set forth in the Motion to Strike filed by the Eastern Seaboard intervenor group. (R-4:596-618)

If this mountain of cost-type, economic and financial evidence had been received in the instant proceeding the instant hearing would, in effect, have amounted to the trial of some 16 different individual producer cost-type cases, and the decisional process required would have involved, in effect, the writing of some 16 different individual producer rate decisions. Any such proceeding would plainly have amounted to an administrative monstrosity. It would obviously have been completely contrary to the objectives emphasized in the Commission's instant order of March 7, 1962, *i.e.*, to obtain a prompt determination of the initial price question (and of the refund obligations of the producer applicants), by a limited proceeding on the basis of the "ground rules" already established by the Commission in *CATCO*, Op. No. 351.[6] In addition, any such procedure would have been completely inconsistent with the Commission's clearly expressed policy determination that producer rates are hereafter to be tried and decided on an area basis, rather than on an individual producer cost basis.

For the reasons indicated above, and for other reasons set forth at length on the record (R-1:106-119), the Presid-

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[6] The Commission took note of the complaints made by the producer applicants as tothe burdens imposed upon them by the extended period required for the final resolution of these problems, stating:

> "As several producers observe, the uncertainies as to these initial prices complicate settlements with royalty owners and interfere with prudent budgeting and other financial matters. We are convinced that such uncertainties can quickly be dispelled in these proceedings as a result of the 'ground rules,' established by our recent *Catco* opinion, for certificate cases originally heard prior to issuance of our General Policy Statement." (mimeo order, p. 5)

The Commission characterized the procedures laid down for the instant proceeding as "designed to abbreviate the duration of applicants' refund uncertainties." (mimeo order, p. 1)

ing Examiner granted a motion by intervenor PSC to exclude all such cost-type, economic and financial evidence.

Since the date of this ruling, the entire problem has been squarely resolved by the Commission in *Skelly*, Op. No. 362 (August 30, 1962). The Commission there held, in strong and unequivocal terms, that economic and financial evidence is generally not to be regarded as germane in resolving the initial price question in producer certificate cases. It will be useful here to quote the Commission's full discussion of this problem in *Skelly*, which is equally applicable and controlling with respect to all of the cost-type, economic and financial evidence offered by the applicants in the instant proceeding. The Commission there stated:

"Texaco's evidence is designed to show the replacement cost of the gas which it sells. It presents industry-wide cost trends and also data on the costs of replacing gas consumed for the United States as a whole and for the Texas Gulf Coast area, using a variety of statistical sources and employing a number of estimates based on judgment. To some extent the results depend on the future demand for gas, for Texaco introduced a factor so as to include not only the cost of replacing the present gas consumed but also additional gas necessary to meet future needs. Thus under Texaco's theory the present consumer would, in effect, be burdened not only with the cost of the already-discovered gas he now consumes, plus at least some of the cost of replacing it, but also with costs associated with the discovery of additional volumes of gas based upon future demand trends. From the country-wide and area-wide data Taxaco then attempts to draw similar conclusions with respect to its own financial needs by comparing its exploration and drilling costs with the industry figures.

"In support of its presentation Texaco quotes the *Phillips* case which states in effect that our ultimate objective will be the determination of fair prices for gas

based on the reasonable financial requirements of the industry. It argues that by 'reasonable financial requirements' we mean the revenues required by the producing industry from sales of natural gas in order to provide funds sufficient to search for, develop and produce gas supplies adequate to meet the continuing demands of the public for gas. In our opinion these observations and Texaco's evidence are not germane to this certificate proceeding. The principal criterion that should be employed here is whether the proposed prices were 'in line' at the time of contract execution as required by the Supreme Court's CATCO opinion. Texaco's observations and evidence may have an important bearing on determinations to be reached in an area rate proceeding, or might be relevant in an individual company rate case although they fall short of showing Texaco's costs. However, we do not think it necessary or appropriate in a certificate proceeding to consider evidence of area costs or financial requirements, or of individual company costs or financial requirements. Any such approach is of limited utility and leads to complicated, long-drawn-out proceedings, detrimental to the public.

"Questions concerning the cost of replacing present reserves, and more particularly whether such costs should be borne by present customers or by venture capital are not questions to be decided in a section 7 certificate proceeding. Rather they

are central questions to be decided in area rate proceedings.

"We therefore hold that cost of service and financial requirements evidence normally is not relevant in producer certificate cases and that the initial price in such proceedings shall be determined by the 'in line' price in the area at the time the producer contract in issue was executed and by our guideline ceiling price for the area. We do not mean to foreclose the possibility that a producer may present compelling circumstances in a particular proceeding to justify a higher price, but we

wish to emphasize that with the guidelines herein established the price issue in certificate cases should be handled expeditiously and that before any evidence which would customarily be presented in establishing a just and reasonable rate can be admitted in evidence, a convincing showing must be made that such evidence is essential to the just disposition of the price question. "Obviously, we cannot permit every individual certificate case to be converted into a full-blown rate case; the proof in this proceeding demonstrates the lack of utility of a limited cost of service presentation.

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"To correct those defects would require a complete rate case, which we have found not warranted in a certificate proceeding." (Op. No. 362, pp. 12-14)

II. THE "IN LINE" PRICE

In its recent decisions in *CATCO*, Op. No. 351, and *Skelly*, Op. No. 362, *supra*, the Commission laid down in clear terms the controlling principles which are to govern the determination of the public interest initial price in producer certificate cases.

The Commission held in *CATCO* that the rate condition issue must be determined on the basis of the "in line" price as of the year when the contracts were executed, stating:

"The first question is as to the date of the 'in lineness.' This question should be determined as of a past date; *otherwise CATCO would be enriched because of procedural delays.*"

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"In our opinion a sale would not meet the test of public convenience and necessity if the price at the time the contract was made was not 'in line' with other prices in the area." (27 F.P.C. 100; emphasis supplied)

"In our opinion, if the price was out of line at the time it was first established in the contract, it is not con-

sistent with the present or future public convenience and necessity, nor with the public convenience and necessity from the time deliveries commenced in 1958." (Order Denying Rehearing, issued March 22, 1962, p. 1 of mimeo order)

Similarly, in *Skelly*, the Commission held:

"Following the Supreme Court Opinion in *CATCO* we must determine the appropriate price 'line' for District No. 4. This line should be determined as of the time the contracts were made . . ." (Op. No. 362, p. 8)

It is also important to note that the Commission made it clear in *Skelly, supra,* that in determining the proper "in line" price, it is necessary to exclude from consideration all those contracts which were "under a cloud" or suspect because their initial rate was under court or Commission review, or because they fell into approximately the same price categories as those subject to review.

The fact is that the Commission in its order of March 7, 1962, in the instant proceeding has already made clear its views with respect to the determination of the proper public interest initial prices *for the instant sales,* as follows:

"In Opinion No. 351 (Continental Oil Co., . . . , F.P.C. issued January 22, 1962) we determined the proper initial price by considering old and new field prices in the south Louisiana area, as of the year of the sales contract, and excluding the prices which the courts have called into question. We held the proper price line to fall between the highest group of prices and the median price and concluded, on the basis of a comprehensive record, that the 'in line' price for 1956 contracts would be not in excess of 18.5 cents per Mcf, where State severance tax did not apply, and 20 cents per Mcf, where such tax applies. It is our present opinion that the 'in line' price is also the 'public interest' price in these proceedings. The instant proceedings, however, involve contracts executed after 1956; and we recognize that some parties may wish an opportunity to show

that the appropriate price line in these procedings differs from that we determined in *Catco*. Furthermore, we shall not foreclose any party from presenting evidence which he believes would compel the conclusion that a higher price would be in the public interest." (mimeo order, pp. 5-6)

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In the light of this Commission conclusion already expressed in the instant proceeding, and the subsequent clear holding by the Commission in *Skelly, supra,* that economic and financial evidence is not to be regarded as germane in resolving the initial price question in producer certificate proceedings, there is left for consideration here only the very limited question as to whether a higher price line is justified in this proceeding than the 18.5 cent price approved in *CATCO,* simply because the instant contracts were executed in 1957 and 1958.

At the threshold of this discussion, it is of interest to note the Commission's Fourth Amendment to its Statement of General Policy No. 61-1, issued October 31, 1961. The Commission there concluded that four Courts of Appeals, in decisions therein cited, had unanimously viewed the 21.5 cent area price level originally established by the Commission for South Louisiana in its First Amendment to the Statement of General Policy, issued October 25, 1960, as being "out-of-line". The Commission accordingly, by the Fourth Amendment, fixed new initial area rates for South Louisiana, from and after October 31, 1961, at the level of 19.5 cents per Mcf, exclusive of taxes, and 21.25 cents where tax reimbursement was applicable. Under these circumstances it is difficult to see how it could seriously be contended here that prices as high as 21.5 cents and above, exclusive of taxes, coud now be approved as proper "in line" prices for contracts executed in 1957 and 1958. The

only serious question here is whether the "in line" price for 1957 and 1958 contracts should be rolled back, as in *CATCO,* Op. No. 351, from the 19.5 cent level established in the Fourth Amendment for contracts executed after October 31, 1961, to the 18.5 cent level approved in *CATCO* for contracts which were executed prior to the Statement of General Policy.

The producer applicants here contend that even if the rate condition issue in the instant case is to be determined on the basis of the "in line" price as of the years 1957 and 1958, when the instant contracts were executed, the "in line" price for those years as correctly determined fully supports their initial contract prices. They rely, in this connection, upon Exh. X-42, Sched. 7, Sheet 1, par 7[7], which shows that out of the permanently certificated sales under 1957 and 1958 long-term South Louisiana contracts which are "not subject to Court or Commission review", 25% of such sales, on the basis of volume, were at prices of 21.3 cents or more during 1957 and 25% were at prices of 22 cents or more during 1958.

However, the difficulty with the Exh. X-42 tabulation is that although it does exclude (Sched. 7, par 7) those contracts which were subject to court or Commission review, it nevertheless violates what the Commission in *Skelly* (Op. No. 362) referred to with approval as "a corollary principle stated by the court in the U.G.I. case" (Op. No. 362, p. 11)—*i.e.,* that

> ". . . where a substantial number of certificated prices are thus under court or Commission review, like prices in the same area though not currently under review ought to be regarded as suspect. In such circumstances it would seem that such similar prices ought not to be

[7] Sponsored by witness Dr. J. Rhoads Foster.

relied upon in fixing a line except upon evidence and findings to the effect tha they are not subject to the same infirmities which are under test in the pending proceedings."[8]

The Commission itself applied this "corollary principle" in *Skelly, supra,* as a basis for excluding from its "in line" price study in that case certain upper-range prices under temporary certificates subsequently made permanent, and certain prices under permanent certificates for the years 1955-1957 relating to sales at 16 to 17 cents to Coastal Transmission Corporation. The Commission stated:

"The prices under temporary certificate fall into approximately the same price categories as those subject to review and thus under the court's reasoning must be regarded as suspect. The applicants have not shown that the prices under temporary certificates are not subject to the same infirmities as those which are under test in the *Skelly* proceeding pending before us. Specifically, no attempt has ben made to show that these suspect like prices were themselves 'in line' at the time they were made."

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"Likewise, the record does not show that the Coastal 1956-1957 sales were not subject to the same infirmities as those in the present proceeding. There is no showing that these earlier prices, which were markedly higher than any jurisdictional sales ever made in Texas District No. 4, established a valid new line for sales to established pipelines in the District. On the contrary, as the table shows in the succeeding three years the great majority of sales (including almost all not procedurally defective) were at less than 15 cents." (Op. No. 362, p. 11)

In addition, it is clear that the Commission applied this "corollary principle" from the *U.G.I.* case in its *CATCO*

[8] *United Gas Improvement Co.* v. *F.P.C.*, 283 F. 2d 817, at 824 (CA 9).

decision (Op. No. 351), as evidenced by the following statement therein:

> "We shall rather determine the 'in line' price using the field price evidence available in the record. This evidence includes prices at the time of the sale in 1956, and before, *which were not affected by initial prices which the courts have called into question.*" (27 F. P. C. 100; emphasis supplied)

There can be no doubt here that those 1957 and 1958 contracts which were executed at price levels *higher* than the 18.5-cent "in line" price ultimately approved by the Commission in *CATCO,* Op. No. 351, "were . . . affected by initial prices which the courts have called into question"—i.e., by the initial CATCO price of 21.4 cents per Mcf, which the Commission certificated without rate condition in its original order of June 24, 1957 (17 F.P.C. 880), which the Supreme Court subsequently "called into question" in its CATCO decision of June 22, 1959, reversing the Commission,[9] and which the Commission thereafter in Op. No. 351 branded as "out of line" and cut down to 18.5 cents per Mcf.

The Commission made this clear in Op. No. 351, where it noted that "there were few prices above a basic rate of 18 cents before the CATCO contracts," but that in 1957, 1958 and 1959 many contracts appeared in the range between 20 and 23 cents.[10] In addition, in its Order Denying Rehearing in that case the Commission noted that

> "in the period July 1, 1954 to June 30, 1956, all but five of 68 contracts contained base prices of 18.5 cents or below and included 88 percent of the gas. *It was not until 1957 and 1958 that the situation changed substantially.*" (Mimeo order, p. 2; emphasis supplied)

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[9] *The Atlantic Refining Co., et al.* v. *F.P.C.*, 360 U.S. 378.

[10] 27 F.P.C. 101.

The impact of the initial CATCO 21.4 cent price unconditionally certificated by the Commission in its original order of June 1957, upon subsequent pipeline purchases in 1957 and 1958 in the South Louisiana area was made clear in testimony presented by Transco witness Stanwood in the *Transco-Seaboard* case, where the instant Docket Nos. G-13183 to G-14351 were originally certificated. Stanwood testified:

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> "Since Transcontinental was attempting to secure substantial volumes of additional gas supplies for its new market requirements, and since producers with available gas supplies generally equivalent in size to the Rayne Field reserves and the CATCO reserves were fully aware of these higher prices, it was obvious to me that Transcontinental would have to offer prices of this same magnitude in order to attract equivalent reserves. In other words, we were obliged to negotiate for the new gas reserves against the background established by these higher prices." (20 F.P.C. 301)

The Supreme Court in its *CATCO* decision, *supra,* took note of the price impact of the Commission's June 24, 1957 unconditional certification of the *CATCO* 21.4 cent original contract price, as follows:

> "... the initial price will set a pattern in an area where enormous reserves of gas appear to be present ... The price certificated will in effect become the floor for future contracts in the area. This has been proven by conditions in southern Louisiana where prices have now vaulted from 17 cents to over 23 cents per Mcf. New price plateaus will thus be created as new contracts are made and unless controlled will result in 'exploitation' at the expense of the consumer, who eventually pays for the increases in his monthly bill.
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> ... The fact that prices have leaped from one plateau to the higher levels of another, as is indicated here, does

make price a consideration of prime importance." (360 U.S. 378, at 390-1)

In view of the circumstances referred to above, it is clear that the substantial upward price changes which occurred in the South Louisiana area in 1957 and 1958 were the result of the Commission's original June 1957 unconditional certification of the *CATCO* 21.4 cent contracts; that we thus have a situation in which the 1957 and 1958 prices at levels higher than 18.5 cents "though not currently under review ought to be regarded as suspect," because they were "like prices in the same area" where "a substantial number of certificated prices were under court or Commission review" [11]—and where, in fact, the Supreme Court's review of the bellwether 21.4 cent *CATCO* contracts ultimately resulted in a finding that the unconditional

certification of such 21.4 cent prices was improper, and that the proper "in line" price therefor was 18.5 cents per Mcf. Furthermore, no attempt was made in the instant proceeding to show that the 1957 and 1958 "suspect like prices" at levels above 18.5 cents were "not subject to the same infirmities" which were under test and ultimately proved fatal in the *CATCO* litigation, which was pending in the courts in 1957 and 1958.

If we therefore eliminate from our 1957 and 1958 comparative price consideration the "suspect like prices" at levels above 18.5 cents per Mcf, there will still remain, as prices which may properly be considered in fixing a price line, the following: 47 contracts executed in 1957, with volumes totaling 56.5 billion cubic feet, and 59 contracts executed in 1958, with volumes totaling 70.5 billion cubic feet, at initial base prices of 18.5 cents or less. In addition, as

[11] *U.G.I.* v. *F.P.C.*, 283 F. 2d at 824.

noted in *CATCO,* Op. No. 351, with respect to contracts entered into during the period July 1, 1954 to June 30, 1956, prior to the Commission's original erroneous *CATCO* order of June 1957 which triggered the general upward movement of prices in South Louisiana, it appears that out of the total 1958 deliveries amounting to 241.2 billion cubic feet, only 63.9 billion cubic feet were sold at prices above 18 cents, while the remaining volumes were sold at lower prices. (27 F.P.C. 102) If the Commission's original CATCO order of June 1957 had correctly drawn the initial price line for South Louisiana at the 18.5 cent level finally established retroactively in Op. No. 351, thus avoiding the fatal errors which led the court to nullify the original unconditioned certificate *ab initio,* it is reasonable to assume that the line would have been held at 18.5 cents per Mcf in a substantial portion of the *other* contracts executed in 1957 and 1958.

Under all these circumstances, it is concluded that the proper public interest initial price applicable to the instant sales is a base price of 18.5 cents per Mcf, adjusted to 20 cents where tax reimbursements are applicable—and that such a price line for the instant 1957 and 1958 contracts is properly based upon and fully supported by the comparative prices under which a substantial amount of natural gas then moved in interstate commerce.[12]

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[12] The 1.5-cent tax reimbursement allowance here provided follows the Commission's tax treatment in *CATCO,* Op. No. 351. In its March 7, 1962 order in the instant proceeding, the Commission described what it did ni *CATCO* as follows:

> "We . . . concluded, on the basis of a comprehensive record, that the 'in line' price for 1956 contracts would be not inexcess of 18.5 cents per Mcf, where State severance tax did not apply, and 20 cents per Mcf, wheer such tax applies." (mimeo order, p. 5)

It is of interest to note, in this connection, that Sched. 6 of producer witness Foster's Exh. X-42 shows that the weighted average reimbursement for South Louisiana contracts executed in 1957 and 1958 which provided for a base price of 18.5 cents and under was 1.69 cents per Mcf.

Before closing the discussion of this particular point, it is of interest to note that the instant producer applicants, in opposing any such determination, have relied heavily upon the following language in the U.G.I. decision, *supra:*

> "... we find without merit the contention that the price line must necessarily accord with the pre-CATCO line. We agree with the view expressed by the Commission in Texas Gas Transmission Corporation, *et al.*, 22 F. P. C. 378, 388, that factors such as increased production costs since CATCO, comparative accessibility of field locations, and comparative depth of sands tend to make pre-CATCO prices irrelevant for comparative purposes in other cases." (283 F.2d at 823)

It must be clear, upon a reading of this case, that the quoted language amounted to *dictum.* The important thing to examine here is what the court really did. It should be noted at the outset that this case involved our instant Docket No. G-16388, being the Superior Oil Company sale to United under a 1958 contract, at an initial price of 21.5 cents per Mcf, plus 2.3 cents tax reimbursement. The issue before the court was the validity of the Commission's original order of August 10, 1959, granting a permanent certificate for that sale without rate condition. The court held improper "the acceptance of questioned existing prices as a guide in setting the line," stating:

> "When an order certificating an initial rate is under court or Commission review, it is possible that the certificate may be eventually denied or price conditions may be attached. In our opinion an existing rate subject to such a hazard does not provide a reasonably reliable basis upon which to predicate a price line.
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> "We go further and express the view that where a substantial number of certificated prices are thus under court or Commission review, like prices in the same

area though not currently under review ought to be regarded as suspect." (283 F.2d at 824)

The court then concluded that it was an abuse of discretion for the Commission in establishing a price line "to rely upon producer prices which are under such a cloud," stating:

> "... with respect to the use for comparative purposes of prices presently under review ... the criteria employed by the Commission in fixing a line by which to test the proposed initial rates ... fall short of what is required under CATCO and the ACT."

The court then held that in issuing a permanent and unconditional certificate upon the basis of a line so determined, the Commission had abused its discretion. Accordingly, the court vacated the Commission order and remanded the case to the Commission for further proceedings consistent with its opinion. (283 F.2d at 826) Such further proceedings have now been held in the instant case.

It seems clear that in relying upon the quoted *dictum* in the *U.G.I.* case, *supra,* as an argument sustaining the reaffirmation here of the identical unconditioned certificate, at the 21.5 cent base price, which the court in that very case set aside as an abuse of Commission discretion, the instant producer applicants seeks to elevate pure *dictum* into the law of the case. This, of course, would amount to a nullification of the court's real holding, and the producer argument must therefore be rejected.

III. THE STAFF PROPOSAL FOR ADOPTION OF A 16-CENT "TRIGGERING LINE" FOR CERTAIN SALES TO TRANSCO

The Staff contends that certain of the instant consolidated dockets which were originally a part of the *Transco-Seaboard* case (*i.e.*, Docket Nos. G-13183, 13184, 13197, 13710, and 14109) [13] are "involved in the 'triggering' of favored-nation clauses of Transco"; that the appropriate initial price for these particular sales should be fixed at 16 cents per Mcf, plus applicable tax reimbursements; that the fixing of such a lower "triggering line" is now the "the only possible way of giving effect to the separate test regarding favored-nations clauses announced in *Atlantic Refining* v. *P.S.C.*, 360 U.S. 378, 391." (Staff brief, p. 14). In making this recommendation, Staff relies on the fact that the initial decision issued on June 17, 1958 in the original certificate proceeding involving these dockets [14] concluded that certification at that time at the initial contract price of 21.5 cents per Mcf would cause substantial triggering of Transco's first-party favored-nation clauses. Since the highest price paid by Transco in South Louisiana prior to the date of these contracts was 16 cents per Mcf, Staff contends:

> "In order to obey the Supreme Court's injunction against allowing ever-higher initial prices to trigger off favored nations clauses, the Commission must fix a 16-cent initial price for these sales." (Staff brief, p. 15)

The Staff's reference to "the separate test regarding favored-nations clauses," announced in the Supreme Court's *CATCO* decision, is based upon the criteria there laid down

[13] See Group A in Apendix A to this decision.

[14] *Seaboard Oil Company*, 20 F.P.C. 330.

to the effect that a certificate should be issued without price condition only (1) if the proposed initial rates were not "out-of-line," [15] and (2) if their approval would not result in a "triggering" of general price rises or an increase of the applicants' existing rates.

It seems apparent, however, that the Supreme Court's "anti-triggering" criteria as laid down in *CATCO, supra,* were intended for use in determining whether a rate condition was required in the public interest in order to accomplish the *blocking* of a triggering price rise. As pointed out by Transco (reply brief, p. 8), by orders recently issued in certain of the dockets severed from the instant proceeding (on July 30, 1962 in *Texaco, et al.,* G-13169, *et al.,* and on August 24, 1962, in Socony-Mobil Oil Company, *et al.,* G-13746, *et al.*) the Commission accepted settlements of producer certificate cases involving sales to Transco from this same "triggering" area, at prices in excess of Staff's alleged "triggering line"—*i.e.,* at 20.625 cents per Mcf including tax reimbursement where applicable, and 19 cents where tax reimbursement was not involved. Under these circumstances, whatever "triggering" impact could result for Transco's other gas purchases, triggering their price up from the 16-cent level which pertained prior to the Transco-Seaboard sales here involved, *has already occurred*—and at levels even higher than the 18.5-cent "in line" price here approved. The Staff proposal is thus meaningless in terms of any objective to "cure" or wipe out a "triggering" problem for Transco's general gas purchases in South Louisiana.

In addition, Transco contends that if a 16-cent "anti-triggering" ceiling is established for these particular contracts in South Louisiana, as distinguished from the 18.5-

[15] Or, if out-of-line, that the public convenience and necessity of certifying at those rates had been established.

cent "in line" price which is otherwise generally being adopted here, it will not be able to compete on equal terms with other pipelines offering 18.5 cents for new gas in South Louisiana. In view of the fact that adoption of the Staff proposal could not in any event have any "anti-triggering" effect for the reasons set forth above, there does not appear to be any justification for placing Transco in such a damaging competitive position. The Staff's proposed 16-cent "anti-triggering" line is therefore rejected.

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IV. STAFF'S REFUND PROPOSAL WITH REGARD TO PREPAYMENTS

Entirely apart from the general question (to be discussed *infra*) as to whether the Commission should here impose a refund obligation with respect to amounts collected in excess of the "in line" price herein approved, the Staff urges that the producer applicants should be required to refund, *in toto*, such monies as they may have received under take-or-pay provisions as payments for gas never delivered. Staff contends, in this connection, that the operation of take-or-pay provisions may in practical effect increase the stated price of gas"; that payment for gas not taken really conceals an effective price which is even higher than the contract level; and that it is necessary to require that such prepayment amounts be refunded "so that the public interest line be held in fact rather than fancy." (Staff brief, pp. 16-17)

The producer applicants point out, however, that under the make-up provisions of the take-or-pay clauses the pipeline purchases actually suffers no ultimate loss if within the make-up period, as provided or extended, it remedies its earlier partial default; that actually little, if any, money prepaid under a take-or-pay clause has ever been forfeited

through failure of application against make-up volumes. Applicant Superior Oil Company, for example, points out that very recently purchasers have requested extensions of the make-up period to prevent any such forfeiture, and that it has granted such extensions to United and Transco. (reply brief, pp. 20-21)

It is pertinent to note that in a rule-making proceeding now pending in Docket No. R-199 the Commission is giving general consideration to the problem of take-or-pay provisions in producer contracts. In recent independent producer certificate cases the Commission has made a practice of conditioning the certificate so as to make its allowance of the proposed take-or-pay provision in the contract subject to its ultimate disposition with respect to such provisions in the Docket R-199 proceeding. That will be done in the instant order.

It is concluded here that the Docket R-199 rule-making proceeding is the proper forum in which this particular problem should be raised. It is noted in this connection that in *Skelly,* Op. No. 362, the Commission recognized that in *Michigan-Wisconsin Pipe Line Company,* Op. No. 353 (March 7, 1962), it had granted an allowance reflecting prepayments for gas by the pipeline purchaser in a rate proceeding. The Commission then stated:

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"While we may allow such prepayments, such an allowance does not require us to approve take-or-pay provisions in producer contracts. This matter, however, is the subject of our Notice of Proposed Rule Making of May 22, 1961, in Docket No. R-199, so that it would be inappropriate to pass upon it now. However, we shall make the producer certificates issued herein subject to the results of the rule-making proceeding." (Op. No. 362, pp. 16-17)

It seems clear that the Commission intends to deal with the problems arising out of such take-or-pay provisions as a matter of *prospective* rule-making. It is not regarded as appropriate or fair to attempt in the instant proceeding to arrive at any general public policy conclusions with respect to the take-or-pay practice *per se*, and to then impose refund obligations upon the instant producer applicants on the basis of conclusions thus arrived at in the instant case alone.

V. THE REFUND QUESTION

Substantial controversy has arisen in this proceeding as to whether the Commission should impose a refund obligation upon the producer applicants, in connection with the imposition of a rate condition reducing the initial price to 18.5 cents per Mcf. The producers contend strongly that the imposition of any such refund condition would be improper and unlawful.

The Commission's recent decisions in *CATCO*, Op. No. 351, and *Skelly*, Op. No. 362, have laid down the controlling criteria for disposition of the refund problem here. In the original *CATCO* proceeding the Commission on June 24, 1957, had granted unconditioned permanent certificates at the producers' proposed 21.4-cent rate. However, PSC and other intervenors initiated review, and the Commission order was subsequently vacated by the Court of Appeals in *P.S.C. of New York* v. *F.P.C.*, 257 F.2d 717 (CA3). This action was subsequently affirmed by the Supreme Court in *Atlantic Refining Co.* v. *F.P.C.*, 360 U.S. 378, and pursuant to the Supreme Court order a "vacation and remand" was issued by the Court of Appeals on November 16, 1959. In Op. No. 351, issued January 22, 1962, the Commission conditioned the certificates theretofore issued to provide a base price, *effective from the date of initial service under the contracts*, of 18.5 cents per Mcf, exclusive of tax reimburse-

ment. In addition, the Commission required the producer applicants to refund to Tennessee a sum equal to the difference between the base price thus approved and the original contract prices charged to Tennessee, applied to all volumes delivered under such contracts from the date of initial delivery until the effective date of the Commission order.

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In *Skelly*, Op. No. 362, *supra*, after the first hearing the Commission had issued a decision on November 22, 1960 (24 F.P.C. 979), finding that the proposed contract prices ranging from 9 cents to 17 cents per Mcf were "in line," and approving permanent certificates. However, upon application by PSC the Commission granted a rehearing. Following the rehearing the Commission issued Op. No. 362, in which it conditioned the certificates to prohibit any total initial price, including all reimbursements and charges, greater than 15 cents per Mcf *from the date of issuance of such order.* Throughout the period prior to Op. No. 362, the producer applicants had operated under unconditioned temporary certificates.

The Commission in Op. No. 362 rejected a proposal for the imposition of refunds, on the ground that the producer applicants had there been operating under unconditioned certificates, *the validity of which had not been challenged on appeal in the courts.* The Commission distinguished *CATCO, supra,* on the ground that the unconditioned price certificates *in that case* were subject to timely court review because challenged and appealed, stating:

> "Unlike the situation in *CATCO* where all of the unconditioned price certificates by which gas was dedicated to interstate commerce were either subject to timely court review because challenged and appealed or (in one case) granted pending such review, the pro-

ducers here have been operating, pending this hearing on their permanent certificate application, pursuant to effective temporary certificates containing no price condition, the validity of which have never been challenged on appeal. Under these circumstances we believe that there is no basis for ordering refunds for the period, prior to the effective date of the permanent certificates being issued herewith, during which the producers were receiving the higher prices unconditionally authorized in their temporary certificates." (p. 15)

Our instant case falls squarely within the *CATCO* criteria, in that the validity of the unconditioned certificates originally issued by the Commission to the instant producer applicants *was* subsequently, in due course, challenged on appeal in the courts, and upon such appeal the Commission orders were reversed and remanded. (See Appendix A to this decision) It is thus clear that a refund obligation should properly be imposed here, under the precedent laid down by the Commission in *CATCO*, and that *Skelly* is not applicable on the refund issue in this proceeding.

Another controlling precedent is found in the Commission's order issued February 9, 1962, in *Socony Mobil Oil Company, Inc.*, Docket No. G-13780, where the relevant facts were identical to those here involved.

Socony was one of the producer applicants to which unconditioned permanent certificates were originally issued by the Commission on September 4, 1958 (at 22.8 cents per Mcf in Socony's case) in *Transcontinental Gas Pipe Line Corporation*, 20 F.P.C. 264. Socony commenced deliveries to Transco under this certificate on September 17, 1959. The validity of this order was subsequently challenged on appeal in the courts, and the Supreme Court in *Public Service Commission* v. *F.P.C.*, 361 U.S. 195, vacated a Court of Appeals judgment affirming the Commission and remanded the case

to that Court with directions "to remand the cases to the Federal Power Commission for reconsideration and redetermination in the light of *Atlantic Refining Co.* v. *Public Service Commission of New York . . .*" After subsequent proceedings pursuant to the court remand, the Commission issued a final order of February 9, 1962, in which it determined that the correct "in line" price was 18 cents per Mcf, and that the certificate issued to Socony should be conditioned to provide a total price of 18 cents per Mcf "*effective . . . from the date of initial service*" under the contract. The order further directed that Socony should refund to Transco a sum equal to the difference between 22.8 cents and 18 cents per Mcf "applied to all volumes delivered to Transco under Socony's F.P.C. Gas Rate Schedule No. 198 from the date of initial delivery to Transco until the first billing date under this order." (mimeo order, p. 3)

Many of the basic arguments raised by the producer applicants against the imposition of refunds in the instant proceeding were similarly raised and fully considered by the Commission in *CATCO, supra,* and were there rejected. Those arguments have no greater validity in the instant proceeding. In Op. No. 351, the Commission stated:

> "In our opinion the examiner acted properly in ordering refunds, although we have no power to order reparations. Here we granted CATCO a certificate and approved the proposed 21.4 cent rate. That certificate was subject to challenge when issued and was challenged successfully. The proceedings were remanded by the Supreme Court, and our order of June 24, 1957 was 'vacated' by the mandate of the Court of Appeals. We now find that the rate should have been 18½ cents. If CATCO were permitted to retain what it has collected under the 21.4 cent rate and file the 18½ cent rate prospectively only, CATCO would be permitted to retain the portion of the rate found unlawful, the Supreme Court's decision and the subsequent hearing would be rendered in part futile, and CATCO would be unjustly

enriched because of procedural delays. . . . To require restitution of the difference between the two rates, in our opinion, is a reasonable condition of issuing permanent certificates to the CATCO companies under the provisions of Section 7(e) of the Natural Gas Act." (27 F.P.C. 110)

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In its *CATCO* rehearing order, the Commission further stated:

"CATCO argues that we have no authority to order refunds of the difference between the 18.5 cent rate determined in our opinion and order and the 21.4 cent rate actually charged. . . . The gist of CATCO's argument is that our certificate granted in June of 1957 allowing the 21.4 cent rate was voidable, not void, and that the rate schedule filed pursuant to our June 1957 order was the legal rate which the applicants were required to charge, citing *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246, 251.

"In our opinion the original certificate was nullified *ab initio* insofar as it was found defective for lack of an appropriate price condition. The same holds true of the rate schedule filed under that certificate. Section 19(b) of the Natural Gas Act provides that the Court shall have authority to 'affirm, modify or set aside' an order in whole or in part. Set aside means to annul, cancel, make void. Pursuant to section 19 the Court of Appeals 'vacated' our original order and its action was affirmed by the Supreme Court. The situation differs in *Atlantic Coast Line R. Co.* v. *Florida*, 295 U.S. 301, 311 cited by CATCO. . . . Unlike the situation in the *Atlantic Coast Line* case we are not merely curing a defect of form in the first order and re-establishing the same rate; we have found that the first order arrived at the wrong initial price and that a lower rate is required by the public convenience and necessity.

"As observed in the *Atlantic Coast Line* case the refund question must be examined in light of the equities. The equities are in favor of a refund here because the

21.4 cent price was charged by CATCO upon the authority of a certificate whose final validity had not been adjudicated, and which was eventually found to be inconsistent with the public convenience and necessity. We are not awarding reparations, in the sense of investigating an effective rate, finding it unlawfully high and ordering a refund; we are reissuing a certificate of public convenience and necessity in place of the certificate issued in June 1957, but with a price condition which in our opinion is consistent with the mandate of the Supreme Court." (mimeo order, pp. 6-7)

In an attempt to distinguish the Commission's refund action in *CATCO, supra,* the producer applicants here stress that the instant unconditioned certificates were not "set aside," and that the Commission itself

has recognized that the instant certificates are "still outstanding." [16] It is contended that this represents an important distinction from the situation in *CATCO,*

> ". . . where the certificates were vacated by the Supreme Court . . . Thus, the discussion of 'void' and 'voidable' certificates at page 6 of the order denying rehearing in the *CATCO* case is not applicable here." [17]

It is concluded that this argument is without merit. Obviously, the Commission itself did not regard the formalistic act of setting aside the unconditioned certificate as a condition precedent to its authority to impose a refund obligation, in view of the following statement in its order of January 10, 1962:

> "Recently, in *Socony Mobil Oil Company, Inc.,* Docket No. G-13780, when confronted with the same problem as is presented here, we set aside the permanent certifi-

[16] Page 1 of the January 10, 1962 order.

[17] Initial brief of Kilroy Properties, Inc., p. 27, footnote 20.

cate and issued temporary authority properly conditioned. But upon further study of this problem, and particularly of the mandate of the District of Columbia Circuit covering Group II of these proceedings, we are now convinced that we can adequately protect the public by redetermining the price issue in the light of governing legal standards. This makes it unnecessary to set aside the certificates." (mimeo order, p. 3)

The various Court of Appeals decisions involved in the judicial remands of the original unconditioned certificate orders in the instant dockets all found that the Commission action approving permanent unconditioned certificates was erroneous. However, as a matter of form, the ordering paragraphs at the end of these court decisions varied in their precise language, from one case to another. For example, the Supreme Court decision in *Public Service Commission* v. *F.P.C.*, 361 U.S. 195 (relating to the Group A dockets in Appendix A to this decision) vacated the Court of Appeals judgment and remanded the cases to that Court "with directions to remand the cases to the Federal Power Commission for reconsideration and redetermination in the light of *Atlantic Refining Co.* v. *Public Service Commission of New York.*" The Court of Appeals decision in *Public Service Commission* v. *F.P.C.*, 287 F.2d 146 (CADC), relating to the Group B dockets, reversed the Commission order and remanded the case to the Commission for further proceedings. The Court of Appeals decisions in *United Gas Improvement Co.* v. *F.P.C.*, 283 F.2d 817 (CA9), and *United Gas Improvement Co.* v. *F.P.C.*, 290 F.2d 147 (CA5), relating to the Group C and D dockets, respectively, *vacated the Commission order* and remanded the matter to the Commission for further proceedings. Finally, the Court

of Appeals decision in *United Gas Improvement Co.* v. *F.P.C.*, 290 F.2d 133 (CA5), relating to the Group E docket,

held that the Commission order must be "set aside" and the proceedings remanded for further appropriate action by the Commission.

Surely it cannot seriously be contended that under such circumstances the propriety of a Commission order imposing refunds upon the producer applicants should hinge upon the precise formalistic language used by the reviewing court in its order reversing and remanding. If such a position were adopted, obligations involving the refund of millions of dollars would be governed not by the facts and the law, but would hinge upon variations in style in the ordering paragraph of the court's decision reversing the Commission. This producer contention is accordingly rejected, and it is concluded that the facts here presented in connection with the refund issue are not reasonably distinguisable from those involved in *CATCO, supra.*

In its March 7, 1962 order in the instant proceeding the Commission stated:

> "The remedial action to be taken by us in either event will turn on the equities presented." (mimeo order, p. 2)

The producer applicants contend that the equities here militate against the imposition of a refund obligation, emphasizing that they commenced deliveries of gas in good faith reliance upon the unconditioned permanent certificates originally issued by the Commission. In addition, they contend that the imposition of refund obligations at this time would create a multitude of operating and financial problems which would impose severe burdens upon them. It is alleged that they have paid substantial royalties on the basis of the Commission's original unconditional certification of their initial contract prices, and that any efforts to recoup any portion of such royalty payments would encounter serious complications at this time.

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This precise question as to the "equities" involved in connection with the refund issue has now been resolved by the Commission, subsequent to its March 7, 1962 order in the instant proceeding, by its Order Denying Rehearing in the *CATCO* case, issued March 22, 1962. The Commission there stated:

> "As observed in the *Atlantic Coast Line* case the refund question must be examined in light of the equities. *The equities are in favor of a refund here* because the 21.4 cent price was charged by CATCO upon the authority of a certificate whose final validity had not been adjudicated, and which was eventually found to be inconsistent with the public convenience and necessity. We are not awarding reparations, in the sense of investigating an effective rate, finding it unlawfully high and ordering a refund; we are reissuing a certificate of public convenience and necessity in place of the certificate issued in June 1957, but with a price condition which in our opinion is consistent with the mandate of the Supreme Court." (mimeo order, pp. 6-7)

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It seems obvious that the types of financial burdens cited here as flowing from the imposition of a refund obligation at this stage must have similarly been involved in the *CATCO* case, *supra*. In fact, similar contentions with respect to possible financial burdens could be made by a producer applicant in any certificate proceeding where, subsequent to the commencement of deliveries under an unconditioned certificate, the validity of the Commission order may be challenged on appeal and subsequently reversed. However, this argument was found not persuasive by the Commission in *CATCO, supra*, and it must be rejected here.

It should finally be noted that many of the arguments advanced in the instant producer briefs in opposition to a refund obligation have actually already been considered and

rejected by the Commission *in this very proceeding—i.e.,* in its order of March 7, 1962.

In its earlier order of January 10, 1962, the Commission had directed that the amounts collected by the producer applicants during the interim

> "shall be subject to such refund provisions as the Commission may lawfully prescribe by its final order in these proceedings . . . to the extent, if any, that the rate which has been collected exceeds the rate ultimately found to accord with the requirements of the public convenience and necessity." (mimeo order, p. 4)

Numerous producer applicants thereafter filed applications for rehearing of that order, characterizing it as a "refund order" and attacking the Commission's authority to impose refund obligations under such circumstances. In its order of March 7, 1962, rejecting these applications for rehearing, the Commission characterized its January 10 order as declaring "an obligation to make refunds on the part of the producer-applicants in those proceedings"; and described the new procedure laid down in the March 7th order as "designed to abbreviate the duration of applicants' refund uncertainties." (mimeo order, p. 1)

Certain of the instant producer applicants had attacked the validity of any such refund obligation as amounting to "entrapment," contending:

> "* * * If such procedure were valid, the Commission could simply issue unconditional certificates, as it has done in this case, and then after the producer has commenced deliveries, summarily issue him a new temporary or permanent certificate subject to the condition that he refund all amounts in excess of the initial rate ultimately determined to be proper in some later proceeding. Thus, the producer would be effectively denied a free choice to accept or reject such conditioned certificate and would be given no opportunity to present

evidence to support his initial contract price prior to the imposition of the refund condition."

The Commission rejected this argument, stating:

> "Our January 10 order asserts no such general power to modify final orders, properly issued after hearing pursuant to Section 7(c) of the Natural Gas Act. The special history of these three groups of proceedings defines the limited power of modification involved here. In every case the statutory hearing has already been held and the producers afforded an opportunity to adduce evidence supporting their price proposals. Our unconditional certificate orders under Section 7 were erroneously issued in the first place and as a result of the invocation of Section 19 have never assumed finality. (The provisions of Section 19 sharply distinguish this Act from the statute construed in *C.A.B.* v. *Delta Air Lines*, 367 U.S. 316) Obviously the substantative errors were ours in accepting the arguments propounded by the producer-applicants; equally obvious, the New York Public Service Commission and the Eastern Seaboard Companies have consistently, publicly, and in the final analysis successfully urged the error of these arguments. The courts having lain bare the errors, it remains our task equitably to correct them."

The Commission noted that the instant producer applicants had accepted unconditional certificates and commenced deliveries in the face of a situation where they knew that their price proposals were being seriously and aggressively litigated. With respect to the Group A dockets in the instant proceeding, the Commission stated:

> "Docket Nos. G-13169 *et al.* were heard and originally decided by us in 1958, prior to the Supreme Court's 1959 decision in *CATCO* (360 U.S. 378). The producers accepted the unconditional certificates prior to the expiration of the 30-day period prescribed by Section 19(a) of the Act for seeking rehearing, and commenced

deliveries. No producer sought an extension of time in which to accept the certificates. But the record and the briefs show that the producers' price proposals were opposed throughout the 1958 proceedings. *Thus the producers have not been 'entrapped'; rather, in presenting their cases and commencing deliveries, they took a calculated risk as to the outcome of any review proceedings which might be brought.* Such proceeding in fact resulted in the remand. *P.S.C. of New York* v. *F.P.C.*, 361 U.S. 195."

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In addition, with respect to the Group B dockets, the Commission noted:

"Docket Nos. G-17336, *et al.* were in hearing at the time of the Supreme Court's *Catco* decision. We issued unconditional certificates on August 10, 1959, largely in reliance upon the Court of Appeals' affirmance of our order in Docket Nos. G-13169, *et al.*, 269 F.2d 865 (CA3, August 4, 1959), reversed 361 U.S. 195. The P.S.C. of New York actively contested the producer price proposals. The Court of Appeals held the record inadequate to support the initial prices proposed and remanded for further proceedings in which the producers might either augment the record or seek an appropriate price condition." (mimeo order, pp. 3-4; emphasis supplied)

The situation with respect to the Group C and D dockets was the same.

Accordingly, for all the reasons indicated above, it is concluded that a refund obligation *should* be imposed in the instant proceeding.

However, it is noted that both the Staff and UGI direct attention, in this connection, to a recent decision of the Court of Appeals for the Fifth Circuit in *H. L. Hunt* v. *F.P.C.*, issued on July 19, 1962, subsequent to the close of the instant hearing. The court there held that where the

Commission rate-conditions the contract price down to a lower initial price level, it may not include a condition prohibiting the producer from filing for his higher contract price under Section 4 of the Act. Staff recommends that, in the event the *Hunt* decision should be sustained,[18] those instant producer applicants who desire to contest the imposition of a refund obligation should be given the option to file retroactively for their original contract price under Section 4; that where this occurs, such increased rate should be retroactively suspended for the full statutory period, with subsequent collections to be held subject to refund under Section 4; that where this option is exercised by the producer applicants, the Commission should vacate the remanded certificates, deny the applications, and cancel the related rate schedules,

> "thus excluding this exclusively-priced gas from jurisdictional commerce in the future and holding the line." (Staff brief, pp. 18-19)

Similarly UGI, referring to the *Hunt* decision, states:

> "... in the event the decision is sustained and deemed applicable, UGI would have no objection to an order which would permit the refund question, with respect to volumes delivered up to the date of the Commission order, to be determined in a proceeding in the nature of a Section 4(e) proceeding." (UGI brief, p. 34, footnote 18) [19]

It is to be noted that if any such procedure were considsidered, the Section 4-type inquiry referred to in both the

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[18] The Commission's petition for rehearing, filed with the 5th Circuit on August 23, 1962, has not yet been acted on.

[19] Under the UGI proposal, the producer applicants would be given an option to reject conditioned certificates. The proposal for determination of the refund question in a Section 4-type proceeding would come into play only where the producer elects to reject the conditioned certificate.

Staff and UGI proposals would have to be conducted as part of the Southern Louisiana Area Rate proceeding, if the Commission is to adhere to its already clearly expressed policy that producer rates are hereafter to be tried and decided on an area basis, rather than on an individual producer cost basis. The net effect would be that the refund issue, after almost a year of activity, would revert to the same posture it occupied at the time of the January 10, 1962 order—a posture which the Commission later concluded, in its March 7th order, was undesirable because it indefinitely prolonged the duration of the applicants' refund uncertainties.

In view of the fact that the *Hunt* decision, *supra*, is currently being appealed, it is concluded that it would be premature for the Presiding Examiner, in determining the appropriate relief to be provided here, to give any consideration to the possible implications of that decision or the extent to which the matters therein set forth may have a bearing upon the issues here involved. Accordingly, no further consideration will be given at this time to the Staff and UGI proposals referred to above.

V. THE OPTION TO REJECT CONDITIONED CERTIFICATES

The Staff suggests that, under the particular circumstances involved in this proceeding, the Commission might properly allow the producer applicants the option, after making appropriate refunds, of rejecting a conditional certificate. It notes that if the Commission had, in fact, imposed price conditions in the certificates as originally issued,

the producers could freely (and arbitrarily) have rejected them. The Staff concludes that when the producers com-

menced deliveries under the original unconditioned certificates, they gave up any such absolute right *as a matter of law;* that nevertheless the Commission has the power to return such a right to the producers, in its discretion, and that the circumstances here involved present sound reasons for the Commission to so exercise its discretion. Staff notes, in this connection, that the producers in the Group A dockets accepted their original certificates before the Supreme Court in its *CATCO* decision "corrected a wide-spread misunderstanding of the Natural Gas Act"; and that the other producer applicants "may have acted upon the same misplaced reliance as the Commission on the court of appeals' affirmance of *Transco-Seaboard.*"

In order to accomplish this result, the Staff suggests that the Commission should vacate all outstanding certificates, reissue conditional ones, and specifically provide that the producers may either accept such certificates (subject to court review) or reject them out-of-hand; that where a producer exercised such option to reject, his application should be deemed denied and the related rate schedule should be cancelled. (Staff brief, pp. 17-18)

UGI makes a similar proposal. It recommends that conditioned certificates be issued, with a refund obligation; that the producer applicants be given 30 days within which to accept or reject such certificates; that where an applicant chooses *not* to accept such a conditioned certificate, service should be discontinued promptly, the applicable rate schedule should be cancelled, and appropriate refunds should be ordered.

Both Transco, purchaser in the instant Group A and D dockets, and Hope Natural Gas Company, purchaser in the Group B dockets, object to any suggestion that the producer applicants be given the option to reject conditioned certificates in this proceeding. Hope Natural Gas Company al-

leges that ten of the instant applications involve contracts under which it purchases natural gas from producers in southern Louisiana. The gas under contract to Hope is gathered and transported to southern Ohio and Pennsylvania delivery points, for the account of Hope, through the facilities of Texas Gas Transmission Corporation and Texas Eastern Transmission Corporation. Hope states that the total package of gas which it has assembled in southern Louisiana for transportation to its market area permits the delivery of up to 100,000 Mcf per day to its customers; that approximately 54 percent of its total transportation gas purchased from independent producers is involved in the instant proceeding; that the Louisiana transportation gas has been flowing steadily to its customers since late 1959, and during this period has become a significant part of the total supply required by Hope, and by the Consolidated Natural Gas System of which it is a part; that if Hope were denied any substantial part of this package of Louisiana gas, it

would be impossible to meet the requirements of its customers, under their present firm demands, without the construction of additional facilities or without contracting for a replacement supply to be delivered at the same points where the transportation gas now enters into Hope's markets. Hope finally contends that the adoption here of any proposal providing the producer applicants with an option to reject would create an undesirable precedent, in conflict with past Commission policy requiring the continuation of deliveries in interstate commerce, once initiated, and would threaten the entire scheme of firm, reliable and continuous service which the certificate provisions in Section 7 of the Act were designed to guarantee. Hope urges that, in the event an option to reject should nevertheless be granted

to the instant producer applicants, it and the consumers dependent upon its supply must have interim protection *before* the gas flowing from such producers is cut off. It contends that at least a year's time would be the minimum required to find and arrange for a replacement supply for its Louisiana transportation gas.

Similarly, Transco argues that any attempt by the Commission to sanction the termination of sales by producers, in the absence of the procedures required by Section 7(b) of the Act, would establish a dangerous precedent in the administration of the Natural Gas Act. It contends that in reliance upon the Commission's consistent policy with respect to termination of sales, Transco has invested millions of dollars in pipeline facilities for the purpose of obtaining supplies of gas from producers, even though the producer certificates were not final in that the issue of price was being contested in the courts; that if the Commission were to change its policy at this juncture, for whatever reason, neither Transco nor any other pipeline could take the risk of constructing facilities until after the lengthy process of court review had run its course; that the result of such action would be to delay the expansion of pipeline facilities and to hamper pipelines and distributors in rendering adequate service to their markets.

It is concluded here that a proposal giving the instant producer applicants the option to reject conditioned certificates at this stage could not be justified by the equities of the situation, nor would it be an acceptable solution in terms of the public interest. This seems clear from an examination of the language used by the Commission in rejecting the "entrapment" argument of the producer applicants in its March 7, 1962 order in the instant proceeding. The Commission there stated:

> "The courts having lain bare the errors, it remains our task equitably to correct them. . . .

"Taking such remedial action differs from the ordinary processing of certificate applications. The typical Section 7(c) case involves ultimately the broad question whether the applicant should be permitted to enter the field; review of proposed initial rates is but one facet of our certificate powers. *When an applicant first proposes interstate service (and prior to dedication under Section 7(c) of the Act)* he is not only entitled to the statutory processes, fairly administered; but *he is also privileged to reject, for whatever reasons he wishes, any tendered certificate, no matter how reasonable the terms offered. In these remedial proceedings, we are called upon to exercise only our rate review powers under Section 7;* no question arises as to the propriety of allowing the producers to introduce their gas into jurisdictional commerce. Thus nothing imperils the producers' 'security of certificate.' By the same token, *there can be no private option here to accept or reject the results of our initial rate review at the regulated company's whim,* any more than a company is free to accept or reject the results of a rate review proceeding under Section 4 or 5 of the Act."[20] (mimeo order, pp. 2-3; emphasis supplied)

As already noted above, the Commission in its March 7, 1962 order emphasized that the instant producer applicants had accepted unconditional certificates and commenced deliveries in the face of a situation where they knew that their price proposals were being seriously and aggressively litigated. The Commission concluded, in this connection:

"Thus the producers have not been 'entrapped'; rather, in presenting their cases and commencing deliveries, they took a calculated risk as to the outcome of any review proceedings which might be brought."

[20] The point made here is that if a natural gas company files for a Section 4 rate increase, which is later rejected by the Commission, the company would not have the option, merely because of dissatisfaction with the Commission holding, to discontinue service under such rate schedules.

Where the producers under such circumstances have permitted their pipeline customers to construct facilities to obtain such supplies of gas, which since then have become a significant part of the latter's total gas supplies required for continued service to their customers, the producers must be regarded as having assumed and accepted the risk that

their initial contract prices might ultimately be reduced as a result of such review proceedings. It would be inequitable under such circumstances to permit the producer applicants to now discontinue that service, merely because they might be dissatisfied with the Commission's action in carrying out the remand of the reviewing courts.

PSC makes a somewhat different proposal, which could similarly lead to discontinuance of deliveries under the instant producer contracts. PSC notes that under the recent decision of the Court of Appeals for the Fifth Circuit in *H. L. Hunt* v. *F.P.C., supra,* if certificates were here reissued rate-conditioning the contract prices down to the approved "in line" price level, the instant producer applicants could promptly file for their higher initial contract prices under Section 4 and could thereafter resume collection of such higher prices, subject to refund, following the statutory suspension period. PSC urges that any such result would undermine the entire point and purpose of the instant proceeding, and would frustrate the Commission's effort to achieve price stability. In order to avoid this, PSC proposes that after determining the proper "in line" initial price level for the instant sales and prescribing refund obligations on that basis, the instant applications should be denied—but without prejudice to the filing of new applications *based upon amended contracts,* in which the contract price should be fixed at the approved "in line" price level, and permitting no price changes until July 1, 1967 or until the determi-

nation of the applicable price for these sales in the AR61-2 Southern Louisiana Area Rate proceeding, whichever may occur first. As its rationale in support of this proposal, PSC suggests that the crucial factor which must now be critically reappraised in the light of the *present* and *future* public convenience and necessity is whether permanent certificates should now be reissued for the instant sales *at all*, at any initial price level. It contends that in connection with any such reappraisal the Commission should take cognizance of the fact that, as a result of settlements approved since the March 7, 1962 order, permanent certificates have now already been reissued for most of the sales and most of the gas originally involved in this remanded proceeding; and that there has been no showing that the purchasers have present or future needs for the *additional* volumes represented by the instant remaining applications.

This PSC proposal, of course, is completely inconsistent with the scope of the instant proceeding as clearly defined by the Commission in its order of March 7, 1962, as follows:

> "(B) The proceedings . . . are consolidated for the limited purpose of determining the public interest initial price or prices applicable to these proceedings."

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Furthermore, the PSC proposal represents a patent effort to avoid the holding of the Fifth Circuit in the *Hunt* case, *supra*. The proper course for dealing with any problems raised by the *Hunt* decision lies in a review of the decision itself, which the Commission is now pursuing, and not in attempts to accomplish by indirection what that decision prohibits.

FINDINGS AND CONCLUSIONS

Upon consideration of the entire record in this proceeding, the evidence adduced and the briefs filed, the Presiding

Examiner finds and concludes, in addition to the findings and conclusions hereinbefore stated, that

(1) Placid Oil Company, Berkshire Oil Company (formerly J. R. Frankel and R. R. Frankel), Hassie Hunt Trust, Phillips Petroleum Company, The Superior Oil Company, J. Ray McDermott and Company, Inc., Kilroy Properties, Inc., *et al.*, Callery Properties, Inc., Ocean Drilling and Exploration Company, Caroline Hunt Sands, *et al.*, Sid W. Richardson d/b/a Richardson Bass, Operator, *et al.*, and Shell Oil Company, independent producers of natural gas, are engaged in the sale of natural gas in interstate commerce for resale for ultimate public consumption, subject to the jurisdiction of the Commission, and each is, therefore, a "natural-gas company" within the meaning of the Natural Gas Act.

(2) The sales of natural gas hereinbefore described, as more fully described in the applications, are made in interstate commerce, subject to the jurisdiction of the Commission, and such sales, together with the construction and operation of any facilities subject to the jurisdiction of the Commission necessary therefor, are subject to the requirements of subsections (c) and (e) of Section 7 of the Natural Gas Act.

(3) The independent producers referred to in the above paragraph (1) are able and willing properly to do the acts and to perform the services proposed and to conform to the provisions of the Natural Gas Act, and the requirements, rules and regulations of the Commission thereunder.

(4) The sales of natural gas by the independent producers referred to in the above paragraph (1), together with the construction and operation of any facilities subject to the jurisdiction of the Commission necessary therefor, are required by the public convenience and necessity, and certificates therefor should be issued as hereinafter ordered and conditioned.

(5) It is necessary and appropriate in the administration of the Natural Gas Act that the initial price charged by the independent producers referred to in the above paragraph (1) for the sales proposed in their certificate applications in this proceeding be not greater than a base price of 18.5 cents per Mcf at 15.025 psia, adjusted to 20 cents per Mcf where tax reimbursements are applicable; and that the take-or-pay requirement in their contracts be revised in accordance with the final order of the Commission to be issued in Docket No. R-199, commenced by Notice of Proposed Rule Making dated May 22, 1961.

ORDER

WHEREFORE, IT IS ORDERED, subject to review by the Commission on appeal, or upon its own motion as provided in the Commission's Rules of Practice and Procedure, that:

(A) Permanent certificates of public convenience and necessity are hereby issued to each of the applicants referred to in finding (1) for the sale of natural gas in interstate commerce for resale as proposed in their applications, together with the construction and operation of any facilities subject to the jurisdiction of the Commission necessary therefor, upon the terms and conditions of this order.

(B) The certificates issued to each of such producer applicants are hereby conditioned so that the base price effective under each of the contracts involved in such applications, from the date of initial service thereunder, shall be, until lawfully changed in the manner provided by the Natural Gas Act, 18.5 cents per Mcf at 15.025 psia, except that the applicants may collect an additional 1.5 cents per Mcf for gas produced in any area subject to the taxing authority of the State of Louisiana, subject to refund to the pipeline buyer with interest at 7 percent per annum if it is finally adjudicated that such

area is not subject to the taxing authority of the State of Louisiana.

(C) The certificates of such producer applicants shall be conditioned so that the take-or-pay requirement in each contract is subject to the provisions of the Commission's final order in Docket No. R-199 as of the effective date of that order.

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(D) Each of such producer applicants shall, within 60 days of the date upon which this order shall become effective, refund to the pipeline buyers with 7 percent interest a sum equal to the difference between the price charged to and collected from such purchasers and the base price set forth in (B) above, applied to all volumes delivered to such purchasers under the contracts which form the subject matter of this proceeding from the date of of initial delivery until the effective date of this order.

(E) Within 10 days of the date of refund provided in Paragraph (D), above, each of the producer applicants shall file with the Commission an officially certified statement showing the amount of the refund, its manner of computation, and the interest payments related thereto, and a statement from the purchaser acknowledging the receipt.

(F) The certificates of such producer applicants are not transferable and shall be effective only so long as each of said applicants continues the acts and operations herein authorized in accordance with the provisions of the Natural Gas Act and the applicable rules, regulations and orders of the Commission.

(G) The grant of the certificates to the producer applicants herein is without prejudice to any findings or orders which have been or may hereafter be made by the Commission in any proceeding now pending or hereafter instituted by or against the applicants.

Joseph Zwerdling
Presiding Examiner

SUMMARY OF REMANDED PROCEEDINGS

A. *The Transco-Seaboard case:* Sales to Transcontinental Gas Pipe Line Corporation.

Docket No. G-	Applicant	Contract Date	Field	Rate Sched. No.	Total Price ¢/Mcf at 15.025 psia
13183	Placid Oil Company	8/13/57	Thibodaux	19	23.55 (base price of 21.5¢ plus tax reimbursement)
13184	" " "	8/13/57	Raceland	18	23.55 " " "
13197	Berkshire Oil Company*	8/12/57	N. Thibodaux	2	23.55 " " "
13710	Sun Oil Company	10/ 7/57	Pointe au Fer	92	23.55 " " "
14254	" " "	12/31/57	Vermilion Blk. 76	101	23.55 " " "
14109	Hassie Hunt Trust	11/ 1/57	Rousseau	19	22.2625
14244	Phillips Petroleum Company	12/23/57	W. Cameron: Blks. 39 & 40 Eugene Is.: Blks. 129A, 172 & 184	350	21.40
14351	The Pure Oil Company	1/16/58	Vermilion Blk. 76	39	21.40

Examiner's decision: *Seaboard Oil Co.*, 20 FPC 330 (June 17, 1958)
Commission order: *Transcontinental*, 20 FPC 264 (September 4, 1958)
Rehearing denied: *Transcontinental*, 20 FPC 571 (October 31, 1958)
Affirmed: *United Gas Improvement Co.* v. *F.P.C.*, 269 F. 2d 865 (CA3, August 4, 1959)
Cert. granted and judgment reversed: *Public Service Commission* v. *F.P.C.*, 361 U. S. 195 (December 14, 1959)

* Formerly Frankel.

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SUMMARY OF REMANDED PROCEEDINGS

B. *The Hope (or Bayou Pigeon) case:* Sales to Hope Natural Gas Company.

Docket No. G-	Applicant	Contract Date	Field	Rate Sched. No.	Total Price ¢/Mcf at 15.025 psia
17337	J. Ray McDermott & Co., Inc.	11/14/58	W. Cameron Blk. 33	12	23.55 (base price of 21.5¢ plus tax reimbursement)
17338	Kilroy Properties, Inc.	12/ 8/58	Bayou Pigeon	3	23.55 " " "
17340	Callery Properties, Inc.	12/10/58	Little Bayou Pigeon	2	23.55 " " "
17341	" " "	12/16/58	W. Rayne	(None filed)	(None filed)
17342	Ocean Drilling & Exploration Company	10/23/58	E. Cameron Blk 4	1	23.55 " " "
17343	" " "	12/13/58	Bayou Pigeon	2	23.55 " " "
17398	Caroline Hunt Sands	8/13/58	So. Thornwell	5	23.55 " " "
17399	Sid W. Richardson	10/17/58	S. Rayne, Maxie, Woodlawn Abbeville & Jefferson Is.	2	23.05 " " "
17413	Mississippi River Fuel Corp.	10/27/58	E. Cameron Blk. 4	14	23.55 " " "
17560	Shell Oil Company	11/25/58	Bayou Pigeon	215	23.55 " " "

Examiner's decision: Waived
Commission order: *Texas Gas Transmission Corp.*, 22 FPC 378 (August 10, 1959)
Rehearing denied: *Texas Gas Transmission Corp.*, 22 FPC 657 (October 7, 1959)
Reversed: *Public Service Commission* v. *F.P.C.*, 287 F. 2d 146 (CADC, December 8, 1960)
Cert. denied: *Hope Natural Gas Co.* v. *P.S.C.*, 365 U. S. 880 (April 17, 1961)
Shell Oil Co. v. *P.S.C.*, 365 U. S. 882 (April 17, 1961)

SUMMARY OF REMANDED PROCEEDINGS

C. *Bayou Penchant, Four Isle Dome and Palmetto Bayou fields:* Sale to United Gas Pipe Line Company.

Docket No. G-	Applicant	Contract Date	Rate Sched. No.	Total ¢/Mcf at 15.025 psia
16388	The Superior Oil Co.	9/8/58	89	2[illegible]8 (base price of 21.5¢ plus tax reimbursement)

Examiner's decision: *The California Co.*, 22 FPC 256 (April 16, 1959)
Commission order: *The California Co.*, 22 FPC 252 (August 10, 1959)
Rehearing denied: *The California Co.*, 22 FPC 653 (October 7, 1959)
Vacated: *United Gas Improvement Co.* v. *F.P.C.*, 283 F. 2d 817 (CA 9, October 31, 1960)
Cert. denied: *Superior Oil Co.* v. *U.G.I.*, 365 U. S. 879 (April 17, 1961)
The California Co. v. *U.G.I.*, 365 U. S. 881 (April 17, 1961)

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D. *Vermilion Block 71 and 76 fields:* Sale to Transcontinental Gas Pipe Line Corporation.

Docket No. G-	Applicant	Contract Date	Rate Sched. No.	Total Price ¢/Mcf at 15.025 psia
16380	The Superior Oil Co.	9/17/58	78	21.4

Examiner's decision: *Superior Oil Co.*, 22 FPC 372 (February 19, 1959)
Commission order: *Superior Oil Co.*, 22 FPC 369 (August 10, 1959)
Rehearing denied: *Superior Oil Co.*, 22 FPC 655 (October 7, 1959)
Vacated: *United Gas Improvement Co.* v. *F.P.C.*, 290 F. 2d 147 (CA5, February 22, 1961)
Cert. denied: *Superior Oil Co.* v. *U.G.I.*, 366 U. S. 965 (June 19, 1961)

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Placid Oil Co., *et al.*
G-13183, *et al.*

APPENDIX A
Page 4

SUMMARY OF REMANDED PROCEEDINGS

E. *Belle Isle field:* Sale to United Gas Pipe Line Company.

Docket No.	Applicant	Contract Date	Rate Sched. No.	Total Price ¢/Mcf at 15.025 psia
G-15122	Sun Oil Company	5/1/58	114	23.8 (base price of 21.5¢ plus tax reimbursement)

Examiner's decision: *Sun Oil Co.*, 22 FPC 355 (March 3, 1959)
Commission order: *Sun Oil Co.*, 22 FPC 351 (August 10, 1959)
Rehearing denied: *Sun Oil Co.*, 22 FPC 654 (October 7, 1959)
Vacated: *United Gas Improvement Co.* v. *F.P.C.*, 290 F. 2d 133 (CA5, February 22, 1961)
Cert. denied: *Sun Oil Co.* v. *U.G.I.*, 368 U. S. 823 (October 9, 1961)

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Docketed Dec 18 1962

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

	Docket Nos.
Placid Oil Company	G-13183
Placid Oil Company	G-13184
Berkshire Oil Company (formerly J. R. Frankel and R. R. Frankel)	G-13197
Hassie Hunt Trust	G-14109
Phillips Petroleum Company	G-14244
The Superior Oil Company	G-16380
The Superior Oil Company	G-16388
J. Ray McDermott and Company, Inc.	G-17337
Kilroy Properties, Inc., *et al.*	G-17338
Callery Properties, Inc.	G-17340
Callery Properties, Inc.	G-17341
Ocean Drilling and Exploration Co.	G-17342
Ocean Drilling and Exploration Co., Operator, *et al.*	G-17343
Sands, Caroline Hunt, *et al.*	G-17398
Sid W. Richardson d.b.a. Richardson & Bass, Operator, *et al.*	G-17399
Shell Oil Company	G-17560

Notice of Extension of Time

(December 18, 1962)

Upon consideration of the motion filed December 17, 1962, by Placid Oil Company and the adoption thereof filed December 18, 1962, by Kilroy Properties, Inc. and Richardson & Bass, and the motions

filed December 18, 1962, by Hassie Hunt Trust, Caroline Hunt Sands and Loyd B. Sands, and Callery Properties, Inc., for an extension of time within which to file exceptions to the Presiding Examiner's decision issued December 7, 1962, in the above-designated matter;

Notice is hereby given that the time within which all parties may file exceptions to the Presiding Examiner's decision issued December 7, 1962, is hereby extended from December 27, 1962, to and including January 14, 1963.

Joseph H. Gutride
Secretary

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Docketed Jan 11 1963

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL POWER COMMISSION

In the Matter of:

Docket No. G-13197

BERKSHIRE OIL COMPANY

Motion for Substitution of Parties

COME NOW J. R. Frankel, L. R. Frankel and Morris Frankel, residents of the County of Harris, State of Texas, R. R. Frankel, a resident of the Parish of Jefferson, State of Louisiana, and Mrs. Mae Frankel Shalett and Harold T. Shalett, residents of the Parish of Orleans, State of Louisiana (hereinafter sometimes referred to collectively as "J. R. Frankel, et al."), and show:

1.

By instruments effective as of November 2, 1961, Berkshire Oil Company transferred to Continental Oil Company the properties in the North Thibodaux Field, Lafourche Parish, Louisiana, which are the

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subject of this Docket. Continental Oil Company, under Docket No. CI62-1508, has applied for a certificate of public convenience and necessity authorizing the continuance of the sale for which Berkshire Oil Company had been granted a certificate in this Docket.

2.

Berkshire Oil Company, having disposed of all of its producing properties, was dissolved and fully liquidated as of September 28, 1962. The only stockholders of Berkshire Oil Company were J. R. Frankel, et al., and, insofar as this proceeding is concerned, they succeeded to the rights and obligations of Berkshire Oil Company as is evidenced by a letter from their counsel to the Honorable J. H. Gutride, Secretary of the Federal Power Commission, dated October 22, 1962.

3.

In view of the foregoing, it is appropriate that J. R. Frankel, et al., be substituted as parties in this Docket in the place and stead of Berkshire Oil Company, now dissolved.

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Wherefore, J. R. Frankel, et al., move that they be substituted as parties in Docket No. G-13197 in the place and stead of Berkshire Oil Company, such substitution to

be effective as of the date of dissolution of Berkshire O
Company on September 28, 1962.

Respectfully submitted,

H. H. Hillyer, Jr.
Milling, Saal, Saunders, Benson
& Woodward
1122 Whitney Building
New Orleans 12, Louisiana
Attorneys for J. R. Frankel, et a
By:.....

STATE OF LOUISIANA
PARISH OF ORLEANS

I, H. H. HILLYER, JR., being duly sworn, depose and sa
that I am an attorney for J. R. Frankel, et al.; that
prepared the above and foregoing Motion for Substitutio
of Parties and that

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the facts set forth therein are true and correct.

H. H. Hillyer, Jr.

Sworn to and subscribed before
me this 9th day of January, 1963. [SEAL]

Ernest L. O'Bannon
Notary Public

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Docketed Mar 13 1963

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners:

Joseph C. Swidler, Chairman; Howard Morgan, L. J. O'Connor, Jr., Charles R. Ross, and Harold C. Woodward.

Docket Nos.
G-17560

SHELL OIL COMPANY

G-17399

PERRY R. BASS (Operator), *et al.*
formerly Sid W. Richardson
d/b/a Richardson & Bass (Operator), *et al.*

Order Conditionally Approving Offers of Settlement and Reissing Certificates of Public Convenience and Necessity

(Issued March 13, 1963)

Offers of settlement of the issues in these South Louisiana certificate proceedings have been filed by Shell Oil Company (on December 21, 1962) and Perry R. Bass (on December 26, 1962). These proceedings were severed by notice issued January 7, 1963 from those in Placid Oil Company, *et al.*, Docket Nos. G-13183, *et al.*

These proceedings were remanded to us as a result of judicial review of a certificate order issued August 10, 1959. *Texas Gas Transmission Corp.* 22 FPC 378, reversed, *Public Service Commission of N. Y.* v. *F.P.C.*, 287 F.2d 146 (CADC). The sales in question are made to Hope

Natural Gas Company under Bass' Rate Schedule No. 5 and Shell's Rate Schedule No. 215.

In general, the proposals follow the pattern approved in *Texaco Inc.*, 28 FPC — (order issued July 30, 1962 in Docket Nos. G-13169 *et al.*) and should be approved subject to the conditions prescribed below. No party has opposed these settlement proposals or waiver of the intermediate procedure in these proceedings.

Each of the settlement offers provides for a tolling of interest on the refunds as of some specified date (ranging from July 1, 1962, to December 31, 1962). In *Texaco Inc., supra,* we did sanction a tolling of interest; but the settlement proposals there approved were filed within a matter of days of the tolling date there proposed. In *Continental Oil Company,* 28 FPC — (order issued December 21, 1962, in Docket Nos. G-11024 *et al.*) we required that interest continue to accrue until the date of actual refund; but in that case we were approving a settlement proposal filed after our final order had been issued. Here we believe

it equitable to permit a tolling of interest, and to prescribe that interest shall continue to accrue until the last day of the month on which the settlement offer was filed.

The Commission further finds:

(1) Shell Oil Company and Perry R. Bass (Operator), *et al.*, are natural-gas companies within the meaning of the Natural Gas Act, as heretofore found, and are engaged in the sale of natural gas in interstate commerce for resale for ultimate public consumption, subject to the jurisdiction of the Commission.

(2) The sales of natural gas proposed by the applications, as amended, are subject to the jurisdiction of the Commission, and such sales, together with the construction

and operation of any facilities subject to the jurisdiction of the Commission necessary therefor, are subject to the requirements of subsections (c) and (e) of Section 7 of the Natural Gas Act.

(3) Applicants are able and willing properly to do the acts and to perform the services proposed, and to conform to the provisions of the Natural Gas Act and the requirements, rules and regulations of the Commission thereunder.

(4) The sales proposed by applicants in the above-captioned dockets, together with the construction and operation of any facilities subject to the jurisdiction of the Commission and necessary therefor, are required by the public convenience and necessity and are in the public interest upon the conditions set forth below, and certificates should be issued as order below effective as of the date of initial delivery.

(5) The conditions attached to the certificates herein issued are required by the public convenience and necessity.

The Commission further orders:

(A) The intermediate decision procedure is waived in these proceedings.

(B) Certificates of public convenience and necessity are hereby re-issued upon the conditions set forth herein, to applicants, effective as of the dates of initial delivery, for the sale of natural gas in interstate commerce for resale as proposed, and for the construction and operation of any facilities subject to the jurisdiction of the Commission necessary therefor, as more fully described in the applications.

(C) The certificates issued by paragraph (B), above, are granted upon the express condition that applicants

fully comply with the terms of the offers of settlement, which are expressly approved, *provided, however,* that interest on all principal amounts to be refunded shall continue to accrue through December 31, 1962.

(D) Within 30 days after making the refunds required by the terms and conditions of this order and the settlement proposals, applicants shall report to the Commission, in writing and under oath, the amount of the refunds made to their purchaser, showing separately the amount of principal and interest so paid and the bases used for such determinations, together with releases from purchaser showing receipt of the refunds in conformity to the settlement as approved.

(E) Upon full compliance of applicants with all the terms of this order and of the settlement proposals, applicants shall be relieved of any further refund obligations in these proceedings and said proceedings shall terminate.

(F) The certificates herein issued are not transferable and shall be effective only so long as the applicant continues the acts and operations hereby authorized in accordance with the provisions of the Natural Gas Act and the applicable rules, regulations and orders of the Commission.

(G) The grant of the certificates herein shall not be construed as a waiver of the requirements of Section 4 of the Natural Gas Act, or of Part 154 of the Regulations thereunder; *provided, however,* that the 30-day notice provision of Part 154.94 (b) and the detailed submitted requirements of Part 154.94 (f) are hereby waived insofar as they apply to the filing of reductions in rate as required by this order and the settlement proposal.

(H) The grant of certificates herein and approval of the settlement proposal is without prejudice to any findings or orders which have been or may hereafter be made by the

Commission in any proceedings now pending or hereafter instituted by or against applicants, particularly any proceeding under Section 5 of the Natural Gas Act, and is without prejudice to claims or contentions which may be made by the Commission, applicant, the Commission staff, or any affected party herein in any other proceeding.

By the Commission.

Joseph H. Gutride,
Secretary.

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Docketed Jul. 17, 1963

UNITED STATES OF AMERICA, FEDERAL POWER COMMISSION

Before Commissioners: Joseph C. Swidler, Chairman; Howard Morgan, L. J. O'Connor, Jr., Charles R. Ross, and Harold C. Woodward.

Docket No. G-13183
Placid Oil Company

Docket No. G-13184
Placid Oil Company

Docket No. G-13197
Berkshire Oil Company

Docket No. G-14109
Hassie Hunt Trust

Docket No. G-16380
The Superior Oil Company

Docket No. G-16388
The Superior Oil Company

Docket No. G-17337
J. Ray McDermott and Company, Inc.

Docket No. G-17338
Kilroy Properties, Inc., *et al.*

Docket No. G-17340
Callery Properties, Inc.

Docket No. G-17341
Callery Properties, Inc.

Docket No. G-17342
Ocean Drilling and Exploration Co.

Docket No. G-17343
Ocean Drilling and Exploration Co., Operator, *et al.*

Docket No. G-17398
Sands, Caroline Hunt, *et al.*

Opinion No. 398

Opinion and Order Issuing Certificates of Public Convenience and Necessity

(Issued July 17, 1963)

WOODWARD, Commissioner:

This is a reopened proceeding of an originally large number of dockets [1] consolidated for hearing under Section 7(c) of the Natural Gas Act "for the limited purpose of determining the public interest initial price, or prices, applicable to these proceedings." [2] Previously the Commission had issued permanent certificates of public convenience and necessity without rate condition in separate consolidated proceedings, all of which were returned for review on judicial remand disclosing error in the original

[1] The proceeding at one time involved 74 applications for certificates of public convenience and necessity by 42 independent producers.

[2] *Texaco-Seaboard Inc., et al.*, Docket Nos. G-13169, *et al.*, order issued March 7, 1962, ordering paragraph (B).

proceedings or on rehearing granted by us upon the basis of the principles laid down in such

court decisions. An outline of the essential facts is contained in the Commission's orders of January 10 and March 7, 1962, and the history of the proceeding is adequately summarized in the examiner's decision. Subsequent to the aforementioned consolidation, 34 dockets were served from the reopened proceeding and permanent certificates of public convenience and necessity were reissued to the applicants in those dockets by order issued July 30, 1962, in *Texaco Inc., et al.*, Docket Nos. G-13169, *et al.*, Order Approving Proposed Settlements and Conditionally Reissuing Certificates of Public Convenience and Necessity. Nineteen additional dockets were accounted for by other severance orders issued prior to June 18, 1962, when the hearing began.

The 21 dockets remaining at the time of hearing involved requests for Commission authorization of sales of gas produced from fields located in or offshore Southern Louisiana at initial contract prices ranging from 21.4 cents per Mcf [3] with no tax reimbursement to 23.8 cents per Mcf for those subject to the taxing authority of the State of Louisiana. Since the hearing, final settlements have been negotiated in an additional eight dockets,[4] leaving 13 dockets in which the initial price is now to be determined bytheCommission. These dockets, and the various court decisions rendered thereon, are as follows:

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[3] All prices are at 15.025 psia.

[4] *Sun Oil Co.*, Docket Nos. G-13710, G-14254, G-15122, order issued November 14, 1962; *Mississippi River Fuel Corp.*, Docket No. G-17413, order issued November 30, 1962; *The Pure Oil Co.*, Docket No. G-1431, order issued December 6, 1962; *Perry R. Bass (Operator)*, Docket No. G-17399 and *Shell Oil Co.*, Docket No. G-17560, order issued March 13, 1963; *Phillips Petroleum Co.*, Docket No. G-14244, order issued March 26, 1963.

(1) *The Transco-Seaboard case:* sales to Transcontinental Gas Pipe Line Corporation.

Docket No. G-	*Contract Date*	*Field*	*Rate Schedule*
13183	8/13/57	Thibodaux	19
13184[5]	8/13/57	Raceland	18
13197	8/12/57	N. Thibodaux	4
14109	11/1/57	Rousseau	19

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Opinion No. 315 and Order issuing permanent certificates, 20 FPC 264, affirmed *U.G.I.* v. *F.P.C.*, 269 F. 2d 865, judgment vacated and cases remanded to the Court of Appeals with directions to remand the cases to this Commission for "reconsideration and redetermination in the light of" *CATCO, P.S.C. of New York* v. *F.P.C.*, 361 U.S. 195.

(2) *The Hope or Bayou Pigeon case:* sales to Hope Natural Gas Co.

Docket No. G-	*Contract Date*	*Field*	*Rate Schedule*
17337	11/14/58	W. Cameron, Blk. 33	12
17338	12/8/58	Bayou Pigeon	3
17340	12/10/58	Little Bayou Pigeon	2
17341	12/16/58	W. Rayne	9
17342	10/23/58	E. Cameron, Blk. 4	1
17343	12/13/58	Bayou Pigeon	2
17398	8/13/58	S. Thornwell	5

[5] Placid Oil Co., applicant in Docket No. G-13184, states that sales commenced March 18, 1959, but that the reserves underlying the dedicated acreage were depleted within 3 months. Abandonment of the sale was permitted by order issued January 12, 1962, in Docket No. CI61-1459. See footnote 27, *post*.

Opinion No. 327 and Order issuing permanent certificates, 22 FPC 378, "reversed insofar as it grants unconditional certification to the initial price proposals" and case remanded to the Commission for further proceedings, *P.S.C. of New York* v. *F.P.C.*, 287 F. 2d 146, cert. den., *sub. nom., Hope Natural Gas Co.* v. *P.S.C. of New York*, 365 U.S. 880.

(3) Sales by the Superior Oil Co. to United Gas Pipe Line Co.

Docket No. G-	*Contract Date*	*Field*	*Rate Schedule*
16388	9/8/58	Bayou Penchant, Four Isle Dome and Palmetto Bayou	89

Order, 22 FPC 252, issuing permanent certificates vacated and cause remanded for further proceedings, *U.G.I.* v. *F.P.C.*, 283 F. 2d 817, cert. den., *The Superior Oil Co.* v. *U.G.I.*, 365 U.S. 879.

(4) Sales by the Superior Oil Co. to Transcontinental Gas Pipe Line Corp.

Docket No. G-	*Contract Date*	*Field*	*Rate Schedule*
16380	9/17/58	Vermilion, Blks. 71 and 76	78

Order, 22 FPC 369, issuing permanent certificates set aside and cause remanded for further proceedings, *U.G.I.* v. *F.P.C.*, 290 F. 2d 147, cert. den., *The Superior Oil Co.* v. *U.G.I.*, 366 U.S. 965.

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On December 7, 1962, the presiding examiner issued an initial decision granting permanent certificates to the applicants herein subject to certain conditions. These condi-

tions require (a) the filing of an inital price of 18.5 cents per Mcf, except that an additional 1.5 cents per Mcf might be charged in areas where the production is subject to State tax; (b) refund to the pipeline purchasers, with 7 percent interest, of the difference between the amounts received by th producers under their original temporary or permanent certificates and the initial price now determined to be required under Section 7 of the Act; and (c) modification of the take-or-pay requirement in each contract to be subject to the final order in the Docket No. R-199 rulemaking proceeding as of the effective date of that order. The examiner also (1) rejected a staff proposal for adoption of a 16-cent triggering line on certain of the sales on the ground that recent settlements in cases involving sales from the same "triggering area" have been made at prices in excess of both the proposed triggering line and the 18.5-cent price found by him to be required for these sales; (2) rejected a recommendation by staff for refund of all monies received by the producers under take-or-pay provisions as payment for gas not delivered; and (3) concluded that a proposal by staff and The United Gas Improvement Co. that the producers be given an option to reject the conditioned certificates could not be justified.

Exceptions to the decision have been filed by all nine remaining producers as well as by Transcontinental Gas Pipe Line Co., U.G.I., and staff In general, the producers have excepted to each condition imposed by the examiner which operates to grant to them a less favorable certificate, and to the imposition of a refund requirement with respect to the past payments. Transco, which had taken no position on the question whether a price condition should be imposed, excepted only to the examiner's direction of a refund applicable to all volumes "delivered" by the producers, noting that in the case of at least one

sale it has made prepayments for gas which it has been obligated to take-or-pay for. It requests that if a refund condition is imposed, the condition be extended to include all gas for which payment has been made at the contract prices. A similar exception was filed by staff and U.G.I. In addition, staff excepted to the examiner's refusal to order total refund of the prepayments for gas paid for but not taken, while U.G.I. excepted to the refusal to give the producers an option to reject the new certificates. No exception was taken to the rejection of the staff's "triggering line" proposal.

The controversy in this proceeding, as exmeplified in the exceptions, centers on five basic questions:

(1) Is the Commission required to consider cost-type economic and financial evidence in determining the initial price question in producer certificate cases generally, and in this proceeding in particular?

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(2) Is the Southern Louisiana "in-line" price of 18.5 cents per Mcf, where State taxes are not applicable, and 20 cents per Mcf, where subject to the State tax, determined by the Commission in the remanded *CATCO*[6] proceedings also the public interest initial price applicable to the sales involved in this proceeding?

(3) May the Commission redetermine its prior orders in these dockets and grant conditioned certificates effective as of the dates of the original orders; if so, should the producers be required to refund the amounts collected by them in excess of the amounts that would have been payable if certificates conditioned as to initial price had been issued?

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[6] *Atlantic Refining Co.* v. *Pub. Serv. Comm. of N. Y.*, 360 U.S. 378.

(4) If conditioned certificates are ordered, should the producers be accorded an option to reject?

(5) Should total refunds be ordered as to all prepayments made for gas not taken?

Upon review of the record, we find we are in almost complete accord with the decision of the presiding examiner and, except for certain modifications, conclude that the decision as therein entered should, with this decision, constitute the decision of the Commission. In particular, we affirm the decision as to its holding that economic and financial evidence, whether on an individual company or on an area-wide basis and whether of the type characterized as cost-of-service studies, cash flow studies, demand-supply, cost, profit and market price trends, area cost-revenue trends, comparative well cost data and gas replacement costs, plays no part in and is irrelevant to the determination of the initial price question in independent producer certificate cases;[7] that the "in-line" price of 18.5 cents per Mcf was properly determined as the price required for initial service under these contracts; that conditioned certificates should be issued effective as of the dates of the original orders and refunds required; and, finally, that there can be no option allowed the producers to reject the conditioned

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[7] *Continental Oil Company, et al.*, Opinion No. 351, issued January 22, 1962; *Socony Mobil Oil Company, Inc.*, Docket No. G-13780, order issued February 9, 1962; *Skelly Oil Company, et al.*, Opinion No. 362, issued August 30, 1962; *Texaco Seaboard, Inc., et al.*, Opinion No. 383, issued March 27, 1963; *Jake L. Hamon, et al.*, Docket No. G-16747, *et al.*, Order Adopting Examiner's Decision, issued April 22, 1963; *El Paso Natural Gas Company, et al.*, Opinion No. 390, issued June 19, 1963. For court decisions upholding the Commission's refusal to examine relative production costs for comparative purposes in determining inline prices, see *U.G.I.* v. *F.P.C.*, 283 F. 2d 817; *California Oil Company, Western Division* v. *F.P.C.*, No. 7148, —— F. 2d —— (CA 10, March 28, 1963); *Atlantic Refining Company* v. *F.P.C.*, —— F. 2d ——, No. 17166, (CADC, March 21, 1963).

certificates, even under the particular circumstances involved in this proceeding. Since the exceptions serve primarily to reargue the determinations made by the examiner and present little, if any, material not adequately disposed of in that decision, our discussion of the above issues will be limited to those few points concerning which the examiner's decision should be modified or amplified. In addition, it is our conclusion that the present and future public convenience and necessity requires that the permanent certificates issued to the producers be further conditioned to hold in abeyance, beyond a level as herein determined, the price escalations provided in the contracts and related rate schedules for a period pending the determination of just and reasonable rates for these sales.

The Post-CATCO Line

Beginning with the Commission's redetermination in *CATCO* of 18.5 cents and 20 cents as the in-line price for 1956 contracts and the area rate of 19.5 cents and 21.25 cents fixed in the Fourth Amendment to the Policy Statement for the initial service from and after October 31, 1961, the examiner stated that the only question was whether the in-line price for instant 1957 and 1958 contracts should be fixed at the 19.5-cent level for contracts executed after October 1961 or at the 18.5-cent level of *CATCO*. Although the producers pointed out that 25 percent of the 1957 Southern Louisiana contracts not subject to court or Commission review were priced at 21.3 cents or more, and 25 percent had a price 22 cents or more in 1958, the examiner rejected this argument, stating "there can be no doubt" that these contracts were affected by the *CATCO* price and that such prices "though not currently under review ought to be regarded as suspect" and could not be relied upon in determining the in-line price.

He noted that the producers made no attempt to show that the 1957-58 "suspect like" prices at levels above 18.5 cents were not subject to the same infirmities which produced the *CATCO* reversal.

After eliminating all prices above 18.5 cents as suspect, the examiner found that there were 47 contracts executed in 1957 with volumes of 56,500 Mmcf and 59 contracts executed in 1958 with volumes of 70,500 Mmcf [8] at initial prices of 18.5 cents or less. Also, out of a total 1958 deliveries of 241,200 Mmcf from Southern Louisiana under contracts made prior to the initial erroneous *CATCO* order, only 63,900 Mmcf was sold at prices above 18 cents. He thereupon concluded that "If the Commission's original *CATCO* order of June 1957 had correctly drawn the initial price line for Southern Louisiana at the 18.5-cent level finally established retroactively in Opinion No. 351, thus avoiding the fatal errors which led the court to

nullify the original unconditioned certificate *ad initio*, it is reasonable to assume that the line would have been held at 18.5 cents per Mcf in a substantial portion of the *other* contracts executed in 1957 and 1958."

In our opinion, the evidence previously presented in the course of the initial proceedings in these dockets and expanded upon in this reopened proceeding confirms the long-developing conclusion that the field price history in Southern Louisiana was decisively influenced by the *CATCO* transaction, our original decision in *CATCO*, and the widespread attention which that decision received. Post-CATCO there was a new floor to prices at 21.4 cents

[8] Although not stated in the decision, the exhibits show that 116 contracts ere executed in 1957 with delivery volumes of 207,000 Mmcf and 139 were ade in 1958 with 261,100 Mmcf to be delivered.

per Mcf and pipelines either had to meet this price or go without the reserves needed for their expansion programs. The Supreme Court's admonition[9] to the effect that the Commission's determination of a proper price in *CATCO* would set the pattern of the Southern Louisiana area is yet to be finally confirmed.[10] What is now certain is that our erroneous order in June 1957 set a pattern of prices substantially in excess of any prices previously existing in the area.

In Opinion No. 351, we recognized that in the years from 1957 through 1959 a number of contracts were executed in the range between 20 and 23 cents, although observing that "even in those years there were many contracts around 18 cents and below and a scattering below 15 cents". It must also be noted however, that many of the contracts referred to in that Opinion as having initial prices of 20 cents or more are the very same sales which are involved in the instant proceeding. In formulating the price line applicable here, the producers would have us rely upon a presentation which, to a large extent, not only incorporates the complete number of contracts originally involved in this proceeding, but likewise includes the *CATCO* contracts, and all at the original contract prices. The decision of the Ninth Circuit remanding one of the dockets involved in this proceeding,[11] which was followed by other courts in setting aside other orders of the Commission granting certificates for sales from Southern Louisiana at prices of 21.4 cents and above,[12] has made it

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[9] *Atlantic Refining Co.* v. *P.S.C. of New York*, 360 U.S. 378, 390.

[10] For a recent observation by the Court see *Wisconsin, et al.* v. *F.P.C.*, Nos. 72, 73 and 74, —— U.S. ——, (Oct. term, 1962, slip op. p. 18).

[11] *U.G.I.* v. *F.P.C.*, 283 F. 2d 817, re The Superior Oil Company, Docket No. G-16388.

[12] *P.S.C. of New York* v. *F.P.C.*, 287 F. 2d 146 (CADC, 1960), cert. denied, 365 U.S. 880 (1961); *U.G.I.* v. *F.P.C.*, 287 F. 2d 159 (CA 10, 1961); *U.G.I.* v. *F.P.C.*, 290 F. 2d 147 (CA 5, 1961), cert. denied, 366 U.S. 956 (1961).

clear that sales which are under Commission or court review are not legally relevant for purposes of determining an in-line price. The same decision also makes plain that like prices in the same area, even though themselves not under review, are equally suspect and "ought not to be relied upon in fixing a line except upon evidence and findings to the effect that they are not subject to the same infirmities which are under test in the pending

proceedings."[13] We agree with the finding by the examiner that the record does not show that the 1957-1958 "suspect like prices" at levels above 18.5 cents were not subject to the same infirmities which produced the *CATCO* reversal. It is our opinion, therefore, that the post-*CATCO* field price statistics relied upon by the producers to support their contract prices provide no valid basis for determination of a proper price line in the Southern Louisiana area. For the reasons set out herein and in the initial decision, we conclude that 18.5 cents per Mcf, exclusive of tax reimbursement, is the proper public interest initial price applicable to the instant sales.

Tax Reimbursement

In addition to the 18.5-cent base price, the examiner allowed a 1.5-cent tax reimbursement on the sales subject to the Louisiana severance tax.[14] A footnote to the decision shows that the allowance "follows the Commission's tax treatment in *CATCO*", but that exidence submitted by the producers indicates that the weighted average tax reimbursement for Southern Louisiana contracts executed in 1957 and 1958 and which provided for a base price of 18.5 cents or less was 1.69 cents. Exception has been taken

[13] 283 F. 2d 824-825.

[14] It appears that the only sales involved in this proceeding which are not subject to the State tax are those in Docket No. G-16380.

by several of the producers to the failure to allow the tax reimbursement of either 2.05 cents or 2.3 cents as provided in their contracts. One producer, Superior, contends that the "error" is even greater than indicated in that the weighted average tax reimbursement under contracts comparable with the price fixed by the examiner was 1.85 cents.

In connection with the applications for rehearing of our Opinion No. 351, we had occasion to reconsider the tax reimbursement allowance granted the producers in that proceeding.[15] At that time we indicated that "We did not intend the 1.5-cent tax reimbursement as an in-line tax provision as of the time of the contract, but because Louisiana taxes, if applicable, were increased on December 1, 1958, we are of the opinion that the partial tax reimbursement of the tax increases provided in the contracts were in the public interest and required by the public convenience and necessity." In our opinion the evidence presented in this record fails to establish that a tax reimbursement greater than 1.5 cents per Mcf is warranted by the statutory standard or that the conclusion quoted above is not equally applicable to the contracts involved in this proceeding.

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Refunds

As in the *CATCO* decision, the examiner's decision would require the producers to refund, with interest, the difference between the sums received from the pipeline purchasers and the sums that would have been received under the conditioned rate. Insofar as the general obligation of the producers to make refunds is concerned, we conclude that refunds should be required for the reasons set out in the examiner's decision. All arguments of the pro-

[15] *Continental Oil Company, et al.*, Docket No. G-11024, *et al.*, Order Denying Rehearing and Clarifying Opinion, issued March 22, 1962.

ducers against their imposition, whether on the basis that we have no power to order reparations, that the original certificates are still outstanding and thus, it is contended, distinguish the Commission's refund action in *CATCO*, or that such a requirement at the present time would amount to "entrapment", have been fully and carefully considered in the initial decision and, we are convinced, correctly decided. Our review gives us no cause to overturn or otherwise disturb the determination made therein. Additional discussion is necessary, however, on certain of the exceptions by Superior and J. R. Frankel, *et al.*, as well as on various ancillary matters bearing on the refund requirement which leads to modification of the order with respect to the computation of interest payments and to the volumes of gas subject to refund requirement.

Superior has excepted to all findings and conclusions based upon or made in reliance on our orders of January 10 and March 7, 1962. It will be recalled that in the first order referred to the Commission, "to the extent that we are empowered to do so", imposed a refund obligation on the producers as to all amounts collected by them in excess of the amounts finally determined herein to accord with the requirements of the public convenience and necessity. Superior's contention is stated as follows:

> "The error in relying on such orders, from Superior's viewpoint, is readily apparent from the orders themselves. The January 10, 1962, Order was entered in a docket in which Superior was not a party. Superior's rights were not involved or affected thereby. The March 7, 1962, Order, denying rehearing on the January 19, 1962, Order necessarily did not consider Superior's dockets, and, but for the matter of consolidation in the hearing therein ordered, clearly is related to dockets and proceedings to which Superior was not a party. Superior is denied every element

of due process of law guaranteed by the *Fifth Amendment* to the *Constitution* of the *United States* if its rights are to be determined in administrative decisions to which it is not a party."

We agree that Superior's rights were not involved or affected by our January 10, 1962 order. Nor, in our opinion, were the rights of any other producers adversely affected by that order. The order did not purport to establish an absolute obligation to make refunds with respect to the certificates involved but merely included a caveat that, in the circumstances of the cases, the Commission could and would order refunds at the conclusion of the proceedings if the initial certificate rates ultimately approved

turned out to be less than the rate than being collected. As such, it neither added a "rate condition" nor changed the rate schedules of the producers concerned; it simply gave notice of the Commission's view that a contingent refund obligation existed because of the timely challenges which had been filed to the orders originally granting certificates for the sales involved. Since no obligation was added with respect to the rates that would not have existed absent the expression of our views, and since the order was addressed solely to the potential effect of future administrative action, it was not reviewable as a final order of the Commission.[16] We conclude, therefore,

[16] *Sunray Mid-Continent Oil Co.* v. *F.P.C.*, 270 F. 2d 404, 407 (CA 10), and cases there cited. Numerous petitions for review of the Commission's order of January 10, 1962, in this proceeding were filed and four of these petitions are still pending in the Fifth Circuit, but have not been acted upon. The only court to have actually considered the question of finality of the Commission's order has been the Third Circuit, which, on October 2, 1962, dismissed the petition in *Shell Oil Co.* v. *F.P.C.*, No. 14031, for lack of jurisdiction.

that Superior was not prejudiced by its non-inclusion in the listing of parties to which the notice of the refund obligation was given in the January 10, 1962 order for the reason that no rights respecting the obligation had been adjudicated prior to joinder of Superior by our order of March 7, 1962. Superior's exception, accordingly, will be denied.

Superior also alleges error in requiring that refunds to be made on the sales to Transco in Docket No. G-16380 from Vermilion Block 76 field. It contends that this sale was commenced and has continued under a temporary authorization without price condition issued October 22, 1958, the validity of which has never been challenged on appeal, and therefore, the sale is not factually distinguishable from the *Skelly* case[17] where we held that refunds should not be ordered for the period prior to the effective date of the permanent certificates then being issued.

A review of the prior history of this sale shows that an unconditioned temporary certificate was in fact issued to Superior on October 22, 1958, pursuant to applications filed September 23 and 24, 1958. Thereafter a hearing was held and, on February 19, 1958,[18] an initial decision was issued granting a permanent certificate. Ordering paragraph (C) provided that "The certificates issued to The Superior Oil Company and to Transcontinental Gas Pipe Line Company shall be deemed accepted and of full force and effect, unless refused in writing and under oath by these applicants within 30 days from the date of issuance of this order . . ." No notification

was received that the certificate was not acceptable to Superior; rather, the company submitted a motion for ex-

[17] *Skelly Oil Company, et al.*, Opinion 362, mimeo. p. 15.

[18] 22 FPC 372.

peditious consideration and disposition of exceptions filed by U.G.I. On August 10, 1959,[19] the Commission issued an order adopting, with modifications not now material, the decision of the examiner. Rehearing was denied by order issued October 7, 1959.[20] The order was vacated by a decision rendered February 22, 1961,[21] and certiorari was denied on June 19, 1961.[22] Thereafter, Superior submitted an application for a temporary certificate to continue the sales from Block 71, indicating that the sale had been discontinued upon the vacating of the Commission's order. In response thereto the Commission dispatched a telegram indicating that no authorization had been granted for discontinuance of the sale in Docket No. G-16380 and stated that "Deliveries should be immediately resumed." The telegram was followed up by a letter order dated August 2, 1961, which stated:

> "The Superior Oil Company is hereby authorized to continue the sale of natural gas, in interstate commerce to Transwestern [sic] Gas Pipe Line Corporation, produced from the Offshore Block 71 and 76 Fields, Vermilion Parish, Louisiana as proposed in Docket No. G-16380. This authorization is subject to the condition that the total rate of 21.4¢ per Mcf at 15.025 psia thereunder shall be subject to such conditions as the Commission shall lawfully prescribe in issuing a permanent certificate in Docket No. G-16380, including any provision for refund thereby imposed. The above specified rate and the condition attached thereto shall remain in effect until changed by further Commission order in the proceeding, Docket No. G-16380."

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[19] 22 FPC 369.
[20] 22 FPC 655.
[21] *U.G.I.* v. *F.P.C.*, 290 F. 2d 147.
[22] *Superior Oil Co.* v. *U.G.I.*, 366 U.S. 965.

Superior, however, replied that the foregoing authorization "was neither requested nor desired insofar as Block 76 Field is concerned. As to that field, this Company was authorized by your letter of October 22, 1958, to commence and continue that sale. For this reason the authorization in letter of August 2, 1961, is superfluous and neither accepted nor acted upon as to Block 76." The final word in this chain of events, prior to the present discussion, is contained in the Commission's reply of August 16, 1961, where we stated:

> "The order of the Fifth Circuit Court of Appeals vacating this Commission's order issued August 10, 1959, in Docket No. G-16380 covered not only the August 10, 1959 order, but also all previous actions taken in Docket No. G-16380. For this reason, the temporary authorization for the continued sales of natural gas to Transcontinental issued August 2, 1961, covers sales from both Offshore Block 71 and Offshore Block 76 Fields."

In our opinion, once we granted Superior a permanent certificate in Docket No. G-16380, the temporary authorization ceased to have any prospective application and was, in effect, automatically cancelled. Assuredly the two charters did not coexist, providing duplicate authority for the same sale. Had the permanent certificate imposed a condition rending inoperative certain contract provisions, the parties certainly could not have relied on the temporary authorization subsequent to August 10, 1959, to support their continued observance of the original provisions. This is so for the reason that a temporary authorization which may be (and here was) granted without notice or hearing cannot predetermine the Commission's prospective action after notice and hearing, to the end that any temporary

authorization can only be effective *pendente lite.* Section 157.28 of the Commission's Regulations under the Natural Gas Act, pursuant to which the temporary authorization was granted to Superior, specifically provides that under such an authorization an independent producer may "continue such sale or transportation pending final Commission action under Sections 4 and 7 of the Natural Gas Act. . . ." The Commission's order of August 10, 1959, constituted such final action in both respects, granting a permanent certificate and continuing acceptance of the rate schedule previously filed. Under Section 1.13(c) of the Commission's Rules of Pratcice and Procedure, the August order became effective when issued.[23]

It is clear, therefore, that from and after August 10, 1959, when the permanent certificate was issued, any sales made by Superior from Block 76 under the contract in question could only have been pursuant to that permanent certificate and not the superseded temporary authorization.[24] Whatever rights might have accrued to Superior under the ensuing permanent certificate were wiped away by the court's action, leaving Superior as a practical matter operating without certificate authorization. The court's judgment that the permanent

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[23] Section 16 of the Act provides that "Orders of the Commission shall be effective on the date and in the manner which the Commission shall prescribe." Section 1.13(c) of the Rules of Practice and Procedure specified that "Orders of the Commission shall be effective as of the dates of issuance unless otherwise specially provided in the orders." No different date is specified in the August 10 order. Moreover, under Section 19(c) of the Act, neither the filing of an application for rehearing nor a petition for review operates as a stay of a Commission order.

[24] Since the original temporary authorization for the Vermilion Block 76 sales did not contain a refund condition, no refund will be required for gas delivered or paid for prior to the issuance of the August 10, 1959 certificate.

certificate was void did not and could not reinstate the temporary authorization nor restore its vitality; a new temporary authorization was needed and was granted by our August 2, 1961 order. Since deliveries had already begun and termination thereof had not been authorized under Section 7(b) of the Act, Superior's rejection of the temporary authorization was without force or legal effect, and that authorization is the basis for the continuation of the sale pending the redetermination made herein on the permanent certificate.

J. R. Frankel, *et al., de facto* successors to the Berkshire Oil Company, applicant in Docket No. G-13197,[25] has excepted to the examiner's findings and conclusions on the ground that, effective November 2, 1961, the producing properties there involved were sold to Continental Oil Company. Frankel contends that Berkshire is, therefore, no longer "engaged in the sale of natural gas" nor is Berkshire now "able and willing" to perform the acts originally proposed.

By order issued May 6, 1963,[26] we approved, to the extent therein specified, a proposed settlement by Continental Oil Company and issued a permanent certificate, effective

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[25] A motion to substitute J. R. Frankel, *et al.*, as parties to this Docket in the place and stead of Berkshire Oil Company was filed January 11, 1963, but has not been previously acted upon. The motion states that Berkshire Oil Company has disposed of all of its producing properties and was dissolved and fully liquidated as of September 28, 1962. The motion also states that the only stockholders of Berkshire were J. R. Frankel, *et al.*, and who, insofar as this proceeding is concerned, succeeded to all the rights and obligations of Berkshire as evidenced by a letter from their counsel to the Commission dated October 22, 1962. Based on the averments contained in the motion, the succession of J. R. Frankel, *et al.*, is hereby approved.

[26] *Continental Oil Company*, Docket No. CI62-1508, order Conditionally Approving Proposed Settlement and Conditionally Reissuing Certificate of Public Convenience and Necessity.

November 2, 1961, for continuation of the sale by Continental. However, no action was taken to vacate Docket No. G-13197 in view of the potential refund liability for the period prior to November 2, 1961.[27] In lieu with the decision reached herein, this refund obligation now falls to J. R. Frankel, *et al.*, with interest thereon to be computed in the manner hereinafter specified.

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While not brought out in the body of the initial decision, ordering paragraph (D) imposes a 7 percent interest charge upon the entire refund. As several of the producers point out in their exceptions, at the time deliveries began in 1958 and 1959 the Commission's Regulations under the Natural Gas Act (Section 154.102 (c)) provided for interest on refunds at the rate of 6 percent per annum. It was not until March 1, 1960, that the 7 percent rate was imposed. Although the provision contained in the Regulations concerns the refunding of excess charges in proceedings arising under Section 4 of the Act, the percentage of interest as specified in that section likewise constitutes our best judgment as to the interest to be charged in this proceeding. Accordingly, in the exercise of our responsibilities under Section 7, we shall require that interest on the refunds be computed at the rate of 6 percent per year up to March 1, 1960, and 7 percent thereafter.

In addition, U.G.I., Transco, and staff have noted that the refund obligation imposed by the examiner would apply only to volumes delivered to the pipeline purchasers from the date of initial delivery and that, under this provision, there would be no refunds made for gas paid for but not taken. Superior's sales to United in Docket No.

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[27] *Cf.*, *Sohio Petroleum Company, et al.*, Docket No. CI61-343, *et al.*, *Placid Oil Company*, CI61-1459, Finding and Order Permitting and Approving Abandonment of Service, etc., issued January 12, 1962.

G-16388 and to Transco in Docket No. G-16380 apparently are the only sales in which prepayments have actually been made and are currently outstanding. The request in the exceptions that the rate condition and refund requirement be made applicable to all volumes paid for from the date of the contracts would, we believe, afford greater justice and will be adopted.[28] Transco has indicated that it would have no objection to a provision that the refund with respect to the prepaid gas be made in gas rather than in money. To the extent that the recommendation is limited only to the quantity of gas paid for but not taken we have no objection to the recommendation and shall include a provision in our order permitting the refund to be made in kind over the life of the contracts without further payment.

The settlement agreements approved by the Commission in the *Transco, United* and *Hope* rate proceedings[29] require that the refund and interest payments to be made by the producers as a result of our decision herein will be passed on to the pipeline's customers and further provide that, subject to certain limitations, these pipelines will file rductions in their rates to reflect the reductions in rates of their suppliers. Accordingly, no further action is necessary in this proceeding to assure that the pipelines will not be unjustly

enriched as a result of these refunds. Although Transco and United may, if agreeable to Superior, elect to take

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[28] See footnote 24, *supra*, for differing treatment with respect to sales from Vermilion Block 76.

[29] *Transcontinental Gas Pipe Line Corporation*, Docket No. RP61-13, order issued February 2, 1962, 27 FPC 187; *United Gas Pipe Line Company*, Docket Nos. G-9547, *et al.*, order issued March 12, 1962, 27 FPC 504, *Hope Natural Gas Company*, Docket Nos. G-5474, *et al.*, order issued December 7, 1962, 28 FPC .

the refund on the prepaid gas in kind as stated above, the intent in the settlement agreements that the refunds by the pipelines to their customers be in money remains unchanged. For purposes of the flow-through provisions of those agreements, we shall require that Transco and United treat these refunds as though received concurrently with the refunds made by Superior on the gas actually delivered.

Option to Reject

The examiner denied a suggestion by staff and U.G.I. that the Commission allow the producers an option, after making appropriate refunds, of rejecting a conditioned certificate. In essence, both parties argue that there is no "need" for the gas involved in this proceeding. Hope Natural Gas Company and Transco, two of the three pipelines involved, objected strenuously to the recommendation on the ground that the gas represented in this proceeding is needed by them to meet their customer's requirements, that extensive investment in pipeline facilities have been made, and that termination of the sales would establish a dangerous precedent in the administration of the Act. The examiner held that "Where the producers under such circumstances [commencing of deliveries while initial price was under litigation] have permitted their pipeline customers to construct facilities to obtain such supplies of gas, which since then have become a significant part of the latter's total gas supplies required for continued service to their customers, the producers must be regarded as having assumed

and accepted the risk that their initial contract prices might ultimately be reduced as a result of such review proceedings. It would be inequitable under such circum-

stances to permit the producer applicants to now discontinue that service, merely because they might be dissatisfied with the Commission's action in carrying out the remand of the reviewing courts."

Only U.G.I. excepted to the refusal to grant the option, arguing: (1) that since the Commission's function in these remanded proceedings is to fashion an equitably remedy that will most nearly restore the parties to the position they would have occupied in the absence of the Commission's original erroneous orders, the producers should be accorded the same opportunity to accept or reject certificates as they would have had had the Commission originally issued price conditioned certificates; (2) that the "dangerous precedent" can be avoided merely by pointing out that granting of the option to reject is based on the particular equities and circumstances presented here and is not to be construed as a waiver of the Commission's authority under Section 7(b); (3) that Transco has already included in its rate base any facilities that might be affected by termination of the sales and is receiving a return thereon; (4) that no producer has indicated that it would choose termination; and (5) that the option would forestall claims as to future deliveries that the price condition is confiscatory.

As recently as February 5, 1963, in an order in *Amerada Petroleum Corporation, et al.*,[30] we rejected a similar suggestion by U.G.I. and others that the producers in that proceeding be permitted an option to reject proposed replacement certificates containing a price condition where unconditioned temporary certificates had been issued, facilities constructed, and the flow of gas had begun. Although the situation was factually distinguishable in that only

[30] Docket Nos. CI62-1544, *et al.*, Order Denying Motion to Impose Price Condition in Temporary Certificates.

temporary authorizations were involved, our decision as there expressed is controlling with respect to the present exception. We may note that the qualification regarding "extraordinary conditions" has been met precisely by the circumstances in these proceedings. Furthermore, any question as the need for this gas is beyond the scope of the present inquiry as established by us in our March 7, 1962 order.

Prepayments

Staff alone has urged that the producers be required to refund, *in toto*, all monies received by them on account of payments for gas not taken. The justification for this request lies in the contention that the operation of take-or-pay provisions may "in practical effect increase the stated price for gas." The examiner rejected the request on the observation that few, if any, prepayments have ever been forfeited through failure to take make-up volumes; he did, however, condition the certificates to render the

take-or-pay provision subject to ultimate determination in the Docket No. R-199 proceeding, the same approach as taken in the *Skelly* opinion. Staff excepted on the basis of lack of evidentiary support for the finding regarding lack of forfeiture of prepayments and that there is no assurance "forfeiture will clearly be avoided here". Exception also was taken by some producers to conditioning the certificates to the Docket No. R-199 proceeding.

As previously noted, Superior's sales to United and Transco apparently are the only ones involving prepayments. Transco's Form 2 Annual Report shows prepayments to Superior of $1,297,914 as of the end of 1961, while United had prepaid $138,726 as of the same period. Fil-

ings by Superior subsequent to submission of the exceptions reveal that the make-up period has been extended from one year to two years in the sale to United [31] and from two years to five years on a portion of the Transco sale.[32] At the present time it does not appear that any past prepayment will necessarily be forfeited. Therefore no action will be taken on the exception by staff. The matter of the take-or-pay provisions, however, is appropriately the subject of consideration in Docket No. R-199 and the producer certificates issued herein were rightfully made subject to the results of the rulemaking proceeding.

Price Increases

To this point our discussion has concerned only those matters on which exceptions have been taken to the determinations made in the initial decision. We now come to the consideration of a question which, though raised in the brief of the New York Public Service Commission and discussed by the examiner, was not the subject of an exception.

The contracts submitted with the certificate applications and the various rate schedules filed with the Commission at the time of the initiation of service provide for periodic increases in the price of the gas to be delivered to the pipeline buyers. In general, the contracts call for a base initial price, exclusive of tax reimbursements,[33] of either 21.4 or 21.5 cents per Mcf with increases of 1 or 2 cents per Mcf

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[31] Rate Schedule No. 89, Supplement No. 2, effective March 21, 1963.

[32] Rate Schedule No. 78, Supplement No. 3, filed February 18, 1963. This filing has not yet been accepted by the Commission.

[33] Depending on the percentage of tax reimbursement in the individual contracts, the total initial price for the on-shore sales is either 23.55 cents or 23.8 cents per Mcf. Superior's off-shore sale in Docket No. G-16380 is within the Federal domain and carries an initial price of 21.4 cents per Mcf.

each four years until a stated maximum is attained. In the majority of the contracts, the date fixed for the first escalation above the initial price is July 1, 1962. In one, the date is March 1, 1963. In others, no precise date is stated, the time for the first escalation being computed as four years after the commencement of initial deliveries. In all cases, the time limitation of the applicability of the initial price has passed and the producers could, under their contracts, file applications with the Commission to put into effect the first of the increases. These rate increases would, of course, be open to suspension for a maximum of five months but then could be collected by the producers subject to refund under Section 4(e) of the Act as to all amounts not ultimately proven to be just and reasonable.

In *CATCO* the Supreme Court wrote: (360 U.S. 378, 391-392)

> Where the application on its face or on presentation of evidence signals the existence of a situation that probably would not be in the public interest, a permanent certificate should not be issued.
>
> There is, of course, available in such a situation, a method by which the applicant and the Commission can arrive at a rate that is in keeping with the public convenience and necessity. The Congress, in § 7(e), has authorized the Commission to condition certificates in such a manner as the public convenience and necessity may require. Where the proposed price is not in keeping with the public interest because it is out of line or because its approval might result in a triggering of general price rises or an increase in the applicant's existing rates by reason of "favored nation" clauses or otherwise, the Commission in the exercise

of its discretion might attach such conditions as it believes necessary.

This is not an encroachment upon the initial rate-making privileges allowed natural gas companies under the Act, *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp., supra,* but merely the exercise of that duty imposed on the Commission to protect the public interest in determining whether the issuance of the certificate is required by the public convenience and necessity, which is the Act's standard in § 7 applications. [The Commission] . . . so conditions the certificate that the consuming public may be protected while the justness and reasonableness of the price fixed by the parties is being determined under other sections of the Act. Section 7 procedures in such situations thus act to hold the line awaiting adjudication of a just and reasonable rate. . . . On the other hand, if unconditional certificates are issued where the rate is not clearly shown to be required by the public convenience and necessity, relief is limited to § 5 proceedings, and, as we have indicated, full protection of the public interest is not afforded.

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While it is true that the decision spoke primarily in terms of holding the price line through a certificate issued at the contract price but conditioned upon payment of refunds if a lower just and reasonable price was subsequently fixed (with the producers reforming contract rights to file further increases also subject to refund), nothing therein suggests that such action would exhaust the Commission's power under Section 7(e) "to attach to the issuance of the certificate *and the exercise of the rights granted thereunder* such terms and conditions as the public convenience and necessity may require." Although dictum

in the opinion, the quoted language clearly states that the Commission, at least in the circumstances described, one of which being where unconditioned approval "might result in a triggering of general price rises," but only may but should exercise its conditioning power to hold the line until a just and reasonable rate can be determined. The examiner's rejection of the staff's proposed 16-cent "anti-triggering" line was correct to the extent that no triggering would occur at the 16-cent level. Consequently, there would have been no blocking of a triggering price rise. This, however, is not true of the escalated prices. Obviously, the line cannot be held simply by conditioning the initial price where, as here, the producers would be at liberty to file price increases immediately on certification at a level which will have a widespread triggering effect in South Louisiana, resulting in the redetermination of many outstanding prices and a general increase in the "asking price" level within the area.

Moreover, the fact that any rate increases, including those adequate to cause triggering and price redeterminations, would themselves be subject to the refunding provisions of Section 4(e) would not, we believe, afford to the consuming public "the complete, permanent and effective bond of protection" which the court has described as the purpose of the Act. That the refund remedy is itself not adequate in many situations to protect the public was specifically recognized by the Supreme Court in its recent decision in *F.P.C.* v. *Tennessee Gas Transmission Company, et al.*, 371 U.S. 145, 154, where it stated:

> . . . True the exaction would have been subject to refund but experience has shown this to be somewhat illusory in view of the trickling down process necessary to be followed, the incidental cost of which is often borne by the consumer, and in view of the tran-

sient nature of our society which often prevents refunds from reaching those to whom they are due.

This general inadequacy of the refund remedy is additionally highlighted in this proceeding by the extensive repercussions which could flow from the very collection of the increased rates provided in the rate schedules.

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We conclude that the present and future public convenience and necessity militates against any grant authorizing the collection of rates in excess of the level at which triggering of favored-nation clauses will occur or which may serve as a basis for price redeterminations at a higher rate under gas purchase contracts in the Southern Louisiana area. Accordingly, it is our opinion that the public interest requires that the certificates now issued to the producers be conditioned to preclude such escalations in the price of the gas here involved. An examination of the applicable contracts of Transco, Hope and United reveals that triggering and price redeterminations will take place at a price in excess of 23.55 cents per Mcf.[34] Since hearings soon will begin in the Docket No. AR61-2 area rate proceeding, which has as its purpose the fixing of a just and reasonable rate on production in Southern Louisiana, a moratorium will be ordered on all price increases in excess of 23.55 cents per Mcf, inclusive of tax reimbursement, pending our final decision in that proceeding or until July 1, 1967, whichever is earlier. In ordering such moratorium, we note that all permanent certificates issued in Southern Louisiana since the decision in the remanded *CATCO* proceeding have contained a similar pro-

[34] While a few prices higher than 23.55 cents are being collected in Southern Louisiana, it appears that those sales are not applicable to the line we are drawing here.

vision and that the inclusion of the provision has been a major factor in our decision to issue those certificates.

The exceptions submitted by five of the producers include a request for an opportunity to present oral argument before the Commission. We conclude that no useful purpose would be served by such argument and that the requests should be denied. The exceptions not discussed herein are disposed of by the examiner's discussion or are immaterial to the result in this case. Except to the extent herein granted, all the exceptions filed are without substantial support or reasonable basis in law and should be denied. The examiner's decision should be modified in accordance with this opinion and as so modified should, with this opinion, be adopted by the Commission as its decision in this case.

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The Commission further finds:

(1) Placid Oil Company, J. R. Frankel, *et al.* (successor to Berkshire Oil Company), Hassie Hunt Trust, The Superior Oil Company, J. Ray McDermott and Company, Inc., Kilroy Properties, Inc., *et al.*, Callery Properties, Inc., Ocean Drilling and Exploration Company, individually and as Operator, and Caroline Hunt Sands, *et al.*, are or, at times material herein, have been engaged in the sale of natural gas in interstate commerce for ultimate public consumption and each is, therefore, a "natural-gas company" within the meaning of the Natural Gas Act.

(2) The sales of natural gas hereinbefore described, as more fully described in the applications, are made in interstate commerce, subject to the jurisdiction of the Commission, and such sales, together with the construction and operation of any facilities subject to the jurisdiction of the Commission necessary therefor, are subject to the

requirements of subsections (c) and (e) of Section 7 of the Natural Gas Act.

(3) Subject to the requirements of our order herein and the conditions attached to the certificate herein issued, the applicants are able and willing properly to do the acts and to perform the services proposed, and to conform to the provisions of the Natural Gas Act and the requirements, rules and regulations of the Commission thereunder.

(4) The sales of natural gas by the independent producers referred to in the above paragraph (1), together with the construction and operation of any facilities subject to the jurisdiction of the Commission necessary therefor, are and have been required by the public convenience and necessity, and certificates therefor should be issued as hereinafter ordered and conditioned.

(5) The conditions attached to the certificates herein issued are required by the public convenience and necessity.

(6) Except as herein granted, the exceptions to the examiner's decision should be denied.

The Commission orders:

(A) Permanent certificates of public convenience and necessity are hereby issued, upon the conditions hereinafter set forth, authorizing the sales and services proposed by:

(1) Placid Oil Company in its contracts with Transco dated August 13, 1957, and filed as Placid's FPC Gas Rate Schedule No. 18, Supplements No. 1, 2, 3 and 4 and Rate Schedule No. 19, Supplements No. 1, 2, 3, 4 and 5;

(2) J. R. Frankel, *et al.*, succesor to Berkshire Oil Company, in the contract with Transco dated August 12, 1957, and previously filed as Berkshire's FPC Gas Rate Schedule No. 4, Supplements No. 1, 2, 3 and 4.

(3) Hassie Hunt Trust in its contract with Transco dated November 1, 1957, and filed as Trust's FPC Gas Rate Schedule No. 19, Supplement No. 1;

(4) J. Ray McDermott and Company, Inc. in its contract with Hope dated November 14, 1958, and filed as McDermott's FPC Gas Rate Schedule No. 12, Supplement No. 2;

(5) Kilroy Properties, Inc. in its contract with Hope dated December 8, 1958, and filed as Kilroy's FPC Gas Rate Schedule No. 3, Supplements No. 1 and 2.;

(6) Callery Properties, Inc. in its contracts with Hope dated December 10, 1958, and December 16, 1958, and filed respectively as Callery's FPC Gas Rate Schedule No. 2, Supplements No. 1, 2, 3, 4, and 5 and Rate Schedule No. 9;

(7) Ocean Drilling and Exploration Company in its contracts with Hope dated October 23, 1958, and December 13, 1958, and filed respectively as Ocean's FPC Gas Rate Schedule No. 1, Supplement No. 1 and Rate Schedule No. 2, Supplements No. 1 and 2;

(8) Caroline Hunt Sands in its contract with Hope dated August 13, 1958, and filed as Sands' FPC Gas Rate Schedule No. 5, Supplement No. 1;

(9) The Superior Oil Company in its contracts with United dated September 8, 1958, and Transco dated September 17, 1958, and filed respectively as Superior's FPC Gas Rate Schedule No. 89, Supplements

No. 1, 2, and 3, and Rate Schedule No. 78, Supplements No. 1, 2, and 3;

and, in each instance, the operations and construction reasonably necessary thereto.

(B) Each certificate issued severally as provided in paragraph (A) above is hereby conditioned so that the base price effective under each of the contracts, from the effective date thereof, and until lawfully changed in the manner provided by the Natural Gas Act, shall be 18.5 cents per Mcf at 15.025 psia, except that the applicants may charge an additional 1.5 cents per Mcf for gas produced in any area subject to the taxing authority of the State of Louisiana, subject to refund to the pipeline purchaser, with interest, if it is finally adjudicated that such area is not subject to the taxing authority of the State of Louisiana. Within 30 days from the date of issuance of this order the applicants shall file supplements to their presently filed rate schedules reflecting the conditioned price as their initial price in lieu of the initial prices provided in their contracts; provided that the notice provisions of Section 154.94(b) and the detailed submittal provisions of Section 154.94(f) of the Commission's Regulations Under the Natural Gas Act are waived insofar as they apply to the reductions in rate hereby ordered.

(C) Each certificate issued in Paragraph (A) above is further conditioned to provide for a moratorium on the filing of all price increases in excess of 23.55 cents per Mcf, inclusive of tax reimbursement, pending the issuance of a final decision in the area rate proceeding in Docket No. AR61-2 or until July 1, 1967, whichever is earlier.

(D) Each of the applicants shall, within 60 days of the date upon which this order shall become effective, refund

to the pipeline purchasers, with interest, a sum equal to the difference between the price charged to and collected from such purchasers and the base price set forth in paragraph (B) above, applied to all volumes paid for by such purchasers under the contracts which form the subject matter of this proceeding from the date of the contracts until the effective date of this order; provided, that no refund is required with respect to the sales made by Superior from the Vermilion Block 76 Field prior to August 10, 1959. The interest charge specified herein and in paragraph (B) above shall be calculated at the rate of 6 percent per annum for all gas paid for prior to March 1, 1960, and at 7 percent per annum thereafter, until full refund has been made.

(E) With reference only to that portion of the refunds which shall involve the outstanding prepayments made by Transco and United under the contracts set forth in Superior's FPC Gas Rate Schedules No. 78 and 89 as required by the take-or-pay provisions of such contracts, Superior may refund, over the life of the contracts a volume of gas attributable to the difference between the conditioned price of 18.5 cents per Mcf and the contract initial base prices. The volume of such refund gas shall be calculated at the initial price fixed herein, and no interest shall be charged. In all other respects the provisions of the contracts pertaining to quantity shall be unaffected. For purposes of the flow-through provisions of Transco's and United's rate settlements, the refunds made under this paragraph shall be treated as though received concurrently with the refund made by Superior on the gas actually delivered.

(F) Within 10 days of the date of the refund provided in paragraph (D) above, each of the applicants shall file with the Commission an officially certified statement show-

ing the amount of the refund, its manner of computation, the interest payments related thereto, and a statement from the purchaser acknowledging receipt thereof.

(G) The certificates herein issued are granted upon the further express condition that the allowance of the take-or-pay for propisions in the applicants' contracts is subject to our ultimate disposition with respect to such provisions in the rule-making proceeding in Docket No. R-199. Upon the establishment, by regulation or policy statement, of a general policy governing such provisions in producer contracts, the applicants shall within 30 days file amended rate schedules in conformity therewith, acceptable to the Commission. The producers shall not be required to file take-or-pay provisions for less than 80 percent of the annual contract quantities. Any changes or modifications to be made in accordance with this paragraph shall be prospective only.

(H) The certificate herein issued to J. R. Frankel, *et al.*, in Docket No. G-13197, shall be deemed to have been effective as to all deliveries made from the acreage therein concerned from the date of the contract through and including November 1, 1961. Further, the certificate herein issued to Placid Oil Company in Docket No. G-13184 shall be deemed to have been effective as to all deliveries made from the acreage concerned therein from the date of the contract through and including January 12, 1962. Upon the submission to, and acceptance by, the Commission of the material required in paragraph (F) above, the certificates so issued and the related rate schedules shall be held vacated and without further force or effect.

(I) The certificates herein isssued are not transferable and shall be effective only so long as each of the appli-

cants continues the acts and operations hereby authorized in accordance with the provisions of the Natural Gas Act and the applicable rules, regulations and orders of the Commission.

(J) The grant of the certificates herein shall not be construed as a waiver of the requirements of Section 4 of the Natural Gas Act, or of Part 154 of the Regulations thereunder. Such grant is without prejudice to any findings or order which have been or may hereafter be made by the Commission in any proceeding now pending or hereafter instituted by or against the applicants. Further, the action in this proceeding shall not foreclose nor prejudice any further proceedings or abjections by the Commission relating to the operation of any price or related provision in the gas purchase contracts here involved.

(K) The motion for opportunity to present oral argument before the Commission is denied.

(L) Except as herein granted, the exceptions to the examiner's decisions are hereby denied.

(M) The examiner's decision, to the extent not inconsistent herewith, is hereby adopted as part of this opinion and order.

By the Commission. Commissioner O'Connor, concurring in part and dissenting in part, filed a separate statement appended hereto. Commissioner Ross, concurring in part and dissenting in part, filed a separate statement appended hereto. Commissioner Morgan, concurring in part and dissenting in part, joined in Commissioner Ross' statement.

JOSEPH H. GUTRIDE,
Secretary.

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Docket No. G-13183, et al
PLACID OIL COMPANY, et al

(Issued July 17, 1963)

O'CONNOR, Commissioner, *concurring in part and dissenting in part:*

The Commission is here concerned with contracts executed in 1957 and 1958 by a number of producers for the sale of gas from the Southern Louisiana area. The contracts range in initial price from 21.40 cents per Mcf, involving no tax reimbursement, to 23.8 cents per Mcf including tax reimbursement. Permanent unconditioned certificates were granted at these prices by the Commission in 1959. Appeals were taken by various intervenors, and the Commission's decisions granting permanent certificates were reversed and/or remanded by the courts. In the remanded proceeding the examiner determined that the in-line price of 1957 and 1958 to which the certificates in these cases should have been conditioned was 18.5 cents plus 1.5 cents tax reimbursement, for a total of 20 cents. He further determined that the Commission's error in granting the 1959 certificates should be corrected retroactively and that the producers should be required to make refunds back to 1959 of all excessive amounts collected under the erroneous certificates. In this order the Commission affirms the examiner on both points.

I am in agreement with the determination by the examiner and Commission of the in-line price of 20 cents inclusive of taxes and with the conclusion that this must be made effective as to these producers retroactive to the date certificates were granted. However, I believe that equitable considerations compel this Commission at the same time to permit the producers to file for rate increases

up to their contract price and to place these increases into effect retroactively.

Whatever technical characterization might be used for the effect of the Court of Appeals mandates and our duty thereunder, it is quite clear that the practical effect of our order is to turn back the clock to 1959 in order now to give consumers the protection from and after that date to which they are entitled. It is my opinion that we are required by fundamental fairness to do the same for the producers. If the Commission in 1959 had correctly granted certificates to these producers conditioned down to a total price of 20 cents, the producers would have had the right under their contracts and under the statute to file for rate increases up to the contract price. After the 30 day notice provision, these would have been suspended for five months and then placed into effect subject to refund. As a result, for the intermediate years 1959-1963 the producers would have collected the higher rate subject to refund; and if the just and reasonable rate ultimately proves to be in excess of 20 cents, they would receive the full benefit of this amount to which they are entitled under their contracts and the Natural Gas Act.

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Were the Commission to fail to correct the initial price to 20 cents effective as of the date the certificates were issued, the consumers would be deprived the protection which the Act affords. Correspondingly, for the Commission to reduce retroactively the initial price yet fail to allow a retroactive increase by the producers to their contract price would be to deprive permanently the producers of their contractual and statutory right to collect (subject to refund) the increased rate over a four year period. A resolution which gives full protection to the rights of all interests is to be found, I believe, in giving retroactive

effect to all elements of the transaction. Two consumer-oriented parties in this proceeding—the Commission staff and United Gas Improvement Company—seem to sense that if turning back the clock is sauce for the consumer goose, it is equally good gravy for the producer gander —for each in its initial brief before the examiner suggests (with certain qualifications) that the Commission permit a retroactive increase for the producers.

In conclusion, the problem posed by the determination that the certificates here were issued initially at an excessive price can be answered in one of three ways. The first, proposed by the producers, would enable the Commission to correct the in-line price error at this time but in a prospective manner only, leaving the consumer to bear the burden from 1957 to 1963 of the Commission's earlier error. The second, adopted by this order, enables the Commission to correct retroactively its earlier error but permits the producers to exercise their rights under their contracts and Section 4(e) of the Act only in a prospective manner, thereby placing a possible permanent loss on them for the 1957-1963 period as a result of the Commission's earlier error. The third approach, suggested by staff and UGI before the examiner as proposed herein, permits a correction of the earlier error with no loss to any party by turning back the clock for all interests. It correctly establishes the in-line price at which the initial sale will be made in 1959, permits an increase by the producers up to their contract price, and subjects that increase to suspension and a refund obligation covering any amount in excess of the just and reasonable price which will be determined in the newly initiated Southern Louisiana area rate proceeding.*

* Since the majority of the Commission has determined not to order refunds for sales made under temporary permits, there is no occasion to consider whether retroactive increases would be appropriate in such circumstances.

Thus, while I agree with all other aspects of the majority's opinion, I cannot join an unconditional order of refunds without provision for a retroactive price increase to effect evenhandedly the correction of the earlier error.

Commissioner

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Docket Nos. G-13183, *et al.*
PLACID OIL COMPANY, *et al.*

(Issued July 17, 1963)

Ross, Commissioner, *concurring* in part and *dissenting* in part:

I dissent only to that portion of the order which limits the refund obligation of Superior Oil Company in Docket No. G-16380 to the period covered by the permanent certificate. In my opinion, Superior should be required to refund the difference between the previously authorized rate and that found proper herein beginning at the time deliveries of gas under the contract commenced.

The facts relevant to this Docket are set forth at pages ten through thirteen in the majority opinion. Briefly, Superior filed an application to make a sale of gas to Transco at a price of 21.4¢ per Mcf which was docketed as G-16380. Superior requested temporary authority to make the proposed sale and, without notice or hearing, was granted such authority. Superior's application was set for hearing after which it was issued a permanent certificate to make the sale at the requested rate. The Fifth Circuit Court of Appeals vacated the Commission's order granting Superior's application in Docket No. G-16380 and remanded the proceeding for further appropriate action.[1]

[1] *United Gas Improvement Company* v. *F.P.C.*, 290 F. 2d 147 (1961), cert. den. 81 S. Ct. 1926.

Section 7(c) of the Natural Gas Act provides, in part, that ". . . the Commission may issue a temporary certificate . . . pending the determination of an application for certificate." The temporary issued to Superior in this docket stated: "This authorization and the acceptance of the rate schedule are without prejudice to such final disposition of the application for certificate as the record may require. . . ."

It therefore seems apparent, as the majority has intimated, that Superior's rights and concomitant responsibilities under the temporary were merged into the permanent certificate subsequently granted on the same application and in the same docket. Accordingly, when the Court vacated the Commission's order granting the permanent certificate, it also effectively repudiated the Commission's prior grant of temporary authority. Under this view, there is no basis for limiting Superior's refund responsibilities to the period covered by its permanent certificate.

This interpreation of the Court's action is clearly consistent with the Commission's earlier letter of August 16, 1961, in this matter in which we stated:

> "The order of the Fifth Circuit Court of Appeals vacating this Commission's order issued August 10, 1959, in Docket No. G-16380 covered not only the August 10, 1959 order [which granted the permanent certificate], but also *all previous actions taken in Docket No. G-16380.*"
> (Emphasis added)

This all-embracing language certainly must be held to include the issuance of temporary authority in that docket.

In addition, the exclusion of the period covered by temporary authority in requiring refunds unjustifiably and improperly ascribes a vitality and legal effect to temporaries, which are considered on an *ad hoc, ex parte* basis, greater than that accorded permanent certificates issued only after all interested parties have had their day in court. The majority is holding that while all of Superior's rights under the Commission's order granting the permanent were extinguished by the Court's reversal, the interim rights which were embodied in the temporary, somehow survived. Because of the summary fashion in which applications for temporary authority are granted, temporary certificates should be given substantially less—not greater —weight than the ensuing permanent certificates.

A unanimous Commission stated in CATCO:[2]

> "In our opinion the examiner acted properly in ordering refunds, although we have no power to order reparations. Here we granted CATCO a certificate and approved the proposed 21.4 cent rate. That certificate was subject to challenge when issued and was challenged successfully. The proceedings were remanded by the Supreme Court, and our order of June 24, 1957 was 'vacated' by the mandate of the Court of Appeals. We now find that the rate should have been 18½ cents. If CATCO were permitted to retain what it has collected under the 21.4 cent rate and file the 18½ cent rate prospectively only, CATCO would be permitted to retain the portion of the rate found unlawful, the Supreme Court's decision and the subsequent hearing would be rendered in part futile, and CATCO would be unjustly enriched because of procedural delays. . . . To require restitution of the difference between the two rates, in our opinion, is a reasonable condition

[2] *Continental Oil Company, et al.*, 27 F.P.C. 96.

of issuing permanent certificates to the CATCO companies under the provisions of Section 7(e) of the Natural Gas Act." (27 F.P.C. 110)

To the extent Superior is not obliged to make refunds for the period covered by its temporary, it would be permitted to retain a portion of the rate found unlawful, the court's decision and the subsequent hearing would be rendered in part futile, and Superior would be unjustly enriched because of procedural delays.

For these reasons, I would adopt the Examiner's proposed ordering paragraph (D) to the extent that it provides for refunds equal to the difference between the price charged to and collected from the pipeline purchasers and the base price with respect to all volumes paid for under the contracts here in question.

Commissioner O'Connor properly states the principle which I believe should govern our disposition of this matter, i.e., to give retroactive effect to all elements of the transaction. His suggestion, however, falls far short of this goal. While he would insure against any unfair loss to producers in this case, pipeline purchasers would not enjoy equivalent protection under his position enunciated in other proceedings.

In order to give full retroactive effect with respect to producer sales, it is necessary to provide for refunds from the time the sales begin in order to protect consumer interests in those situations where the initially authorized price exceeds that ultimately found just and reasonable. However, a majority of the Commission, composed of Chairman Swidler, Commissioners O'Connor and Woodward explicitly have held that refund provisions *will not*

normally be imposed in temporary certificates.[3] How then would this proposal give "full protection to the rights of all interests?" Until such time as a majority of this Commission is willing to go both ways, adoption of Commissioner O'Connor's suggestion would only aggravate an already lopsided situation favoring the producers.[4]

I concur with the imposition of the condition in these certificates which precludes the filing of a rate increase above the triggering line. Such a condition may be helpful in view of the majority's position on the triggering question in *Shell Oil Company, et al.*, Docket Nos. RI61-515, et al., Opinion No. 382, order dated March 15, 1963. However, that condition would have been unnecessary if the minority position in *Shell, supra,* of which I was a part, had been adopted.

Commissioner Morgan has authorized me to state that he joins in this statement.

CHARLES R. ROSS,
Commissioner

6107

FPC Gas Rate Schedule No. 2, Docket No. G-17340 Received. Filing Date 10-19-59. Effective Date: Date of Initial Delivery

Gas Purchase Contract

This Contract, made and entered into as of the 10th day of December, 1958, by and between Hope Natural Gas Company, a West Virginia corporation, herein referred to as "Buyer", and Callery Properties, Inc., a Delaware corporation, Alberta S. Kimball and Ted Leyhe,

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[3] Amerada Petroleum Company, Docket Nos. CI62-1544, *et al.*, order dated February 3, 1963.

[4] See *Skelly Oil Company*, Opinion No. 362, August 30, 1962, in which the Commission did not provide for refunds during the term of temporary authority.

and Pioneer Oil & Gas Co., Inc., a Louisiana corporation, herein referred to collectively and in the singular as "Seller";

WITNESSETH:

WHEREAS, Seller represents that it owns and/or controls certain valid and subsisting oil and gas leases and interests in the Bayou Pigeon Fields, Iberia Parish, Louisiana, which are productive of natural gas and which lands and leases are more fully described in Exhibit "A" attached hereto and made a part hereof; and,

WHEREAS, Buyer desires to acquire a supply of natural gas for use in its Appalachian markets, to be transmitted through transportation systems, which should be completed on or before September 30, 1959, from the area described in Exhibit "A" to Buyer's or Buyer's affiliates' transportation system in Buyer's or Buyer's affiliates' Appalachian market area; and,

WHEREAS, Seller desires to sell natural gas to Buyer in the amounts and upon the terms and conditions herein set forth, and subject to the terms and conditions hereof, represents that Seller can and will so delivery natural gas to Buyer;

NOW, THEREFORE, in consideration of the premises and mutual covenants herein contained, the parties hereto do covenant and agree as follows:

ARTICLE I

Definitions

The following terms shall respectively have the meaning set forth below:

(a) The term "Seller" and the term "Buyer" shall have the meaning set forth above;

(b) The term "Transporter" shall mean the pipeline company or companies which transport the gas to be delivered under this contract from the point of delivery to Buyer's or Buyer's affiliates' pipeline system;

(c) The term "gas" shall mean all natural gas produced from a well classified as a gas well and/or oil well by the Department of Conservation of the State of Louisiana;

(d) The term "gas well gas" shall mean all natural gas produced from a well classified as a gas well by the Department of Conservation of the State of Louisiana;

(e) The term "oil well gas" shall mean all natural gas produced from a well classified as an oil well by the Department of Conservation of the State of Louisiana;

(f) The term "Contract Year" shall mean each successive period of twelve (12) calendar months commencing with the first day of the calendar month following that in which first deliveries of gas are made to Buyer hereunder or commencing on October 1, 1959, whichever is earlier;

(g) The term "Contract Quantity" shall mean a daily quantity of gas determined as provided in Section 3 or Article III;

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• • • It is expressly understood and agreed between the parties that Buyer shall pay to Seller each month, so long as an "additional tax" shall be in effect and shall not exceed two cents (2¢) per one thousand (1,000) cubic feet, an amount sufficient to reimburse Seller for three-fourths (¾) of such "additional tax". In the event all or any part of such liability of Seller is not determined or determinable by the end of any month, then such additional amount per one thousand (1,000) cubic feet required in respect of such liability not determined or determinable shall be set forth for all such months in any calendar year in a statement

to be rendered by Seller to Buyer by April 1 of the following year and Buyer shall pay the amount due pursuant to such statement on or before May 1 of such following year. In the event that the "additional tax" shall exceed two cents (2¢) per one thousand (1,000) cubic feet, Buyer and/or Seller may pay the excess over two cents (2¢) per one thousand (1,000) cubic feet without an obligation on the part of the other party to reimburse for any part thereof, and in the event that neither Buyer nor Seller agrees to pay such excess, this contract shall terminate three (3) months from the date such "additional tax" shall exceed two cents (2¢) per one thousand (1,000) cubic feet.

3. A price redetermination for the pricing periods designated as 1C, 1D and 1E of this Article VII will be agreed upon between Buyer and Seller not less than nine (9) months nor more than twelve (12) months prior to the beginning of the period for which redetermination is desired. Such determination is to be made by the parties or, if they are unable to agree, by a board of arbitrators as hereinafter provided, to be made and

concluded not less than eight (8) months prior to the beginning of such period. Upon such request, the parties, or the arbitrators, shall determine the three (3) highest prices to be paid at the beginning of such period by any three (3) different operating interstate transporters of natural gas (not excluding Buyer) for gas produced in Iberia, St. Martin, St. Mary, Assumption, and Iberville Parishes, Louisiana, under contracts with producers, under which deliveries of gas are being made at the time of agreement or arbitration, providing for deliveries of gas for an initial term or not less than twenty (20) years, and upon substantially similar terms of measurement, quantity, quality and delivery provided herein, and the prices to be paid

during such period shall be the average of such three (3) highest prices per Mcf; provided, however, that in no event shall the price per Mcf hereunder be less, during the respective periods than the price shown above for such periods. For the purposes of this Section, "price" shall be deemed to include tax reimbursement.

ARTICLE VIII

Miscellaneous

1. No waiver by either party of any one or more defaults by the other party in the performance of this contract shall operate or be construed as a waiver of any future default or defaults, whether of a like or a different character.

2. (a) Any payment, statement or bill provided for in this contract shall be in writing and shall be directed to the post office address of each of the parties, as the case may be, as follows:

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Buyer:	Hope Natural Gas Company P. O. Box 1951 Clarksburg, West Virginia
Seller:	Callery Properties, Inc. 400 Bank of the Southwest Building Houston 2, Texas

(b) Any notice, request or demand provided for in this contract shall be in writing and shall be directed to the post office address of each of the parties, as the case may be as follows:

Buyer:	Hope Natural Gas Company P. O. Box 1951 Clarksburg, West Virginia
Seller's Representative:	F. A. Callery, Inc. 400 Bank of the Southwest Building Houston 2, Texas

or at such other address as the above parties shall from time to time designate for the purpose by a registered or certified letter addressed to the other party.

(c) Notwithstanding any other actual or constructive knowledge of or notice to Buyer, no change or division in ownership in this contract by Seller shall be binding upon Buyer for any purpose until after Buyer receives, at the place specified above, certified copies of the instrument or instruments, or other legally authenticated written evidence, constituting or accomplishing the change in ownership from the party acquiring the interest or right in this contract or from Seller.

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Gas Purchase Contract

This contract, made and entered into as of the 16th day of December, 1958, by and between Hope Natural Gas Company, a West Virginia corporation, herein referred to as "Buyer", and Callery Properties, Inc., a Delaware corporation, United Producing Company, Inc., a Maryland corporation, Kilroy Properties, Incorporated, a Delaware corporation, Pinoeer Oil & Gas Co., Inc., a Louisiana corporation, Alberta S. Kimball and Ted Leyhe, herein referred to collectively and in the singular as "Seller";

WITNESSETH:

WHEREAS, Seller represents that it owns and/or controls an interest in certain valid and subsisting oil and gas leases in the West Rayne Area, Acadia Parish, Louisiana, which lands and leases are productive of natural gas and are located within the area outlined on Exhibit "A-1" and more fully described in Exhibit "A", both of which are attached hereto and made a part hereof; and,

WHEREAS, Buyer desires to acquire a supply of natural gas for use in its Appalachian markets, to be transmitted through transportation systems, which should be completed on or before September 30, 1959, from the area outlined on Exhibit "A-1" to Buyer's or Buyer's affiliates' transportation system in Buyer's or Buyer's affiliates' Appalachian market area; and

WHEREAS, Seller desires to sell natural gas to Buyer in the amounts and upon the terms and conditions herein set forth and,

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subject to the terms and conditions hereof, represents that Seller can and will so deliver natural gas to Buyer;

NOW, THEREFORE, in consideration of the premises and mutual covenants herein contained, the parties hereto do covenant and agree as follows:

ARTICLE I

Definitions

The following terms shall respectively have the meaning set forth below:

(a) The term "Seller" and the term "Buyer" shall have the meaning set forth above.

(b) The term "Transporter" shall mean the pipeline company or companies which transport the gas to be delivered under this contract from the point of delivery to Buyer's or Buyer's affiliates' pipeline system.

(c) The term "gas" shall mean all natural gas produced from a well classified as a gas well and/or oil well by the Department of Conservation of the State of Louisiana.

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ARTICLE VII

Prices

1. The price to be paid by Buyer to Seller for gas delivered by Seller to Buyer or to be paid for if not taken hereunder shall be as follows:

A. For all gas purchased from date of first delivery and for the first four (4) year period thereafter 21.5¢ per 1000 cu. ft.

B. For all gas purchased for the next four (4) year period 22.5¢ per 1000 cu ft.

C. For all gas purchased for the next four (4) year period 23.5¢ per 1000 cu ft.

D. For all gas purchased for the next (4) four year period 24.5¢ per 1000 cu. ft.

E. For all gas purchased thereafter 25.5¢ per 1000 cu. ft.

2. Buyer agrees to pay or reimburse Seller for the gathering tax and severance tax and any renewal or extension thereof, or any similar tax which may be levied upon such gas, up to and including the sum of two and five hundredths cents (2.05¢) per one thousand (1000) cubic feet at the pressure base at which such tax may be computed. Any sales, transaction, occupation, service, production, severance,

gathering, transmission, export or excise tax, assessment or fee hereafter levied, assessed or fixed by the United States or any state or other governmental authority and taxes of a similar nature or equivalent in effect (not including income, excess profits, capital stock, franchise, or

general property taxes) increasing or in addition to or greater than those being levied, assessed or fixed at the date of this contract in respect of or applicable to the gas to be sold by Seller to Buyer hereunder and which Seller may be liable for during any month, either directly or indirectly through any obligation to reimburse others, are hereinafter collectively referred to as an "additional tax". It is expressly understood and agreed between the parties that Buyer shall pay to Seller each month, so long as an "additional tax" shall be in effect, an amount sufficient to remiburse Seller for three-fourths (¾) of any additional tax which shall not exceed two cents (2¢) per one thousand (1000) cubic feet plus one-half (½) of any additional tax which shall exceed two cents (2¢) per one thousand (1000) cubic feet. In the event all or any part of such liability of Seller is not determined or determinable by the end of any month, then such additional amount per one thousand (1000) cubic feet required in respect to such liability not determined or determinable shall be set forth for all such months in any calendar year in a statement to be rendered by Seller to Buyer by April 1 of the following year, and Buyer shall pay the amount due pursuant to such statement

on or before May 1 of such following year.

In the event that any tax or additional tax which Buyer shall have paid or reimbursed to Seller pursuant to the provisions of this Section 2 of Article VII shall be determined to be unconstitutional, Seller shall refund to Buyer the amount thereof theretofore so paid or reimbursed to Seller by Buyer, to the extent that Seller is reimbursed by the applicable governmental agency for such payments of said unconstitutional tax so made by Seller; provided, however, that until the constitutionality of the gathering tax of one cent (1¢) per Mcf presently provided for under Revised

Louisiana Statute 47:671 and the gathering tax of one cent (1¢) per Mcf presently provided for under Act 8 of the 1958 Louisiana Legislature is finally determined by a court of competent jurisdiction, Buyer shall not be obligated hereunder to reimburse Seller for any such gathering taxes so paid by Seller unless Seller has taken such steps as many be proper and necessary to protest payments of such gathering taxes and thereafter institutes and prosecutes the proper proceedings to validate such protests.

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6356

(Docketed Aug. 12, 1963)

Petition for Rehearing of The Superior Oil Company and Motion for Stay of Ordering Paragraphs of Opinion 398 (excerpt)

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XIII.

The Commission erred in holding that Superior shall be prohibited for any period of time from filing for any rate increase which it feels is justified and is allowed by its sales contract. *H. L. Hunt, et al.* v. *Federal Power*

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Commission (5 C.A. 1962), 306 Fed.2d 334.

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6378

(Docketed Aug. 13, 1963)

Docket Nos. G-17342 and G-17343
(Docket Nos. G-13183 et al.)

Application for Rehearing
(excerpt)

* * * * * * * * * *

6388

COUNT 5

The Commission has erred and has exceeded its authority in Ordering Paragraph (C) in providing a moratorium on the filing of all price increases in excess of 23.55¢ per MCF pending the issuance of a final decision in the area rate proceeding in Docket No. AR 61-2 or until July 1, 1967, whichever is earlier.

There is no evidence in the record before the Commission which pertains to the effect of filing by Odeco of its contractual price increases. Prior to the date of this order the Commission has not placed such restrictions in permanent certificates except those granted in accordance with settlements. Since other producers have been permitted to retain the benefit of their entire contractual pricing arrangement, Odeco is being discriminated against by lack of similar treatment. Arbitrary discrimination between persons in similar circumstances

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is a denial of due process of law. Arbitrary action by the Commission is not due process of law and a judgment, decision or determination by the Commission prior to a hearing of all evidence on the matter amounts to a deprivation of property without due process of law.

The Court in Catco reaffirms that although once gas is committed by a producer to interstate commerce movement the producer is a captive subject to the jurisdiction of the Commission, he is not without a remedy to protect himself since he may, unless restricted by contract, file new rate schedules under Section 4 of the Act. However, the Commission here, while requiring Odeco to remain in a captive status, also is depriving Odeco of the very remedy of protection which the Court held was available. The only authority under the Act which sanctions the modification of Odeco's contract is that if the Commission, after hearing, determines such contract to be unjust, unreasonable, unduly discriminatory or preferential, then it may modify. But it is clear that such right of modification does not exist where no hearing on the question has been held and the Commission merely speculates that such contract *may* be unjust, unreasonable, etc. As stated by the Court in *Mobile*,[5] the Act is a single statutory scheme under which all rates are established initially by the natural gas companies, by contract or otherwise, and all rates therein are subject to being modified by the Commission

upon finding that they are unlawful. Further, that there is no intention in the Act to abrogate private rate contracts as such, it being contemplated that the relations between the buyer and seller of gas will be established initially by contract and the public interest will be protected by the supervision of the individual contracts by the Commission. By Ordering Paragraph (C) the Commission has overriden the right of Odeco to establish its relationship with its purchaser by contract, and the Commission has modified Odeco's contract and the rates provided for therein without any hearing on whether or not such rates are unlawful.

[5] *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956).

Under the guise of a condition to a permanent certificate of public convenience and necessity, the Commission cannot forbid what Congress has expressly allowed to a natural gas producer. *Hunt* v. *F.P.C.*, 306 F. 2nd 334 (C.A. 5, 1962). The Court there held that the Commission could not lawfully prescribe as a condition in a temporary authorization that the specified initial price may not thereafter be increased without express approval of the Commission and the Court indicated that the Commission's conditioning authority would be even more restricted in proceedings involving permanent certificates. Even if the Commission could attach conditions preventing the contractual pricing provisions from becoming effective, such restriction may be for only a limited time only, and of course any condition must be reasonable, so it necessarily follows that the time from which Odeco is precluded from placing its prices into effect must be a reasonable time which may only be determined after a hearing as to what constitutes such a reasonable time. The Commission in conditioning the initial contract price and restricting the other contractual pricing provisions has

completely abandoned the approach deliberately selected by Congress and deprives Odeco of the rights granted under the law as a concomitant of the duties imposed upon Odeco by the law.

COUNT 6

Since, as to Odeco, the Commission has constituted the decision of the presiding examiner as the decision of the Commission, Odeco, as further specification of the errors of the Commission in its order complained of, adopts and incorporates herein by reference each of the Exceptions of Odeco to the decision of the presiding examiner as heretofore filed with the Commission.

COUNT 7

As to each and all of the errors set out hereinabove, the Commission acted without support of substantial evidence, acted in an arbitrary and discriminatory manner, all with the result that Odeco's property is confiscated and Odeco is denied due process of law in contravention of the Fifth Amendment to the Constitution of the United States and in contravention of the Natural Gas Act and without authority under any statute, or otherwise.

* * * * * * * * * * *

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UNITED STATES OF AMERICA, FEDERAL POWER COMMISSION

(Docketed Sep. 11, 1963)

Before Commissioners: Joseph C. Swidler, Chairman; L. J. O'Connor, Jr., and Charles R. Ross.

Docket No. G-13183
Placid Oil Company

Docket No. G-13184
Placid Oil Company

Docket No. G-13197
J. R. Frankel, *et al.*

Docket No. G-14109
Hassie Hunt Trust

Docket No. G-16380
The Superior Oil Company

Docket No. G-16388
The Superior Oil Company

Docket No. G-17337
J. Ray McDermott and Company, Inc.

Docket No. G-17338
Kilroy Properties, Inc., *et al.*

Docket No. G-17340
Callery Properties, Inc.

Docket No. G-17341
Callery Properties, Inc.

Docket No. G-17342
Ocean Drilling and Exploration Co.

Docket No. G-17343
Ocean Drilling and Exploration Co., Operator, *et al.*

Docket No. G-17398
Sands, Caroline Hunt, *et al.*

Opinion No. 398-A

Memorandum Opinion and Order Clarifying Opinion and Order, Denying Applications for Rehearing and Motion to Reopen for Additional Evidence, and Granting Stay

(Issued September 11, 1963)

Applications for rehearing have been filed to our Opinion and Order issued July 17, 1963, in the above-entitled proceeding by various of the parties.[1] Motions for stay of the Order pending action on the applications and until the completion of judicial review also have been submitted. The application filed by Placid Oil Company, *et al.* in Docket Nos. G-13183, G-13184, G-14109, and G-17398 include a motion to reopen the proceeding on the basis of facts which have become available since the initial decision. Transcontinental Gas Pipe Line Corporation has requested

[1] The Superior Oil Co., Ocean Drilling and Exploration Co., J. R. Frankel, Kilroy Properties, Inc., Placid Oil Co., Hassie Hunt Trust and Caroline Hunt Sands, J. Ray McDermott and Co., Inc., Callery Properties, Inc., New York Service Commission, Long Island Lighting Co. and The United Gas Improvement Co., and Transcontinental Gas Pipe Line Company.

certain clarification of the decision as to its obligation to make refunds to its customers in respect to gas paid for but not yet taken into its system. Our examination of the rehearing applications indicates that a number of the issues argued therein are simply restatements, often in similar terms, of arguments previously advanced by the parties and adequately covered in the Opinion.

In particular these include the sales considered in fixing the price line, the kind of evidence to be used in determining whether the initial price is in the public convenience and necessity, the amount of tax reimbursement allowed, denial of the option to reject, the moratorium on the filing of price increases, and, in general, the matter of the refunds required of the producers. A rediscussion of these points would be largely repetitious and could serve no useful purpose. We direct our attention, therefore, to the remaining matters.

Several of the producers urge error in our failure to grant, as a bare minimum, the 20.625 cents per Mcf initial rate allowed in the orders approving settlements in other Southern Louisiana certificate proceedings. Without engaging in an extended discussion, we may note that a settlement, as its title connotes, is an accommodation of conflicting arguments and positions which is agreed to as a reasonable basis for terminating a proceeding in a manner consistent with the public interest. The settlement of the pending controversy with its elimination of further expense and delay, the savings attendant thereon, and the stability of prices which results, balanced against the possible allowance of a somewhat higher price to the producers or a waiver of a portion of the refunds which might otherwise be forthcoming are all elements which enter into consideration in the determination whether the offer accords

with the public interest. In the instant dockets settlement could not be achieved and, as a consequence, it was necessary that an in-line price be determined for these sales. The fact that this price is lower than the price at which the settlements have been effected itself affords no basis for objection, nor does it support the assertions that our failure to fix a price equal to that allowed in the settlements is in any way capricious, arbitrary, unfairly discriminatory, violative of the Natural Gas Act, or constitutes an unconstitutional deprivation of property without due process of law.

The producers also argue that we erred in putting a condition in the certificates issued them to the effect that the take-or-pay requirement in each contract is subject to the provisions of our final order in the rule-making proceeding in Docket No. R-199, with the limitation that we would not require them to accept provisions for less than 80 percent of the annual contract quantities. The condition is identical with that provided in *Panhandle Eastern Pipe Line Company, et al.*, Opinion No. 350, and *Michigan Wisconsin Pipe Line Company, et al.*, Opinion No. 353, and in a number of other producer certificate proceedings. The charge of indefiniteness in the certificates occasioned by the condition is answered in our treatment of similar arguments in *Skelly Oil Company, et al.*, Opinion No. 362-A and *Texaco Seaboard, Inc., et al.*, Opinion No. 383, wherein the condition as initially imposed was modified to provide for a maximum reduction to 80 percent of the volumes provided in the contracts. As noted, this qualification is already provided in the condition applied in this proceeding. Moreover, applicants' uncertainty as to the terms under which

they are required to sell their gas production is alleviated further by the proviso that any changes or modifications

to be made as a result of the rule-making proceeding is to have only prospective application.

The application for rehearing filed by Kilroy Properties, Inc., *et al.* states that Kilroy transferred substantially all of its interest in the properties involved in Docket No. G-17338 by an assignment dated September 1, 1962, the actual transfer to have been effective January 1, 1962. Notice of the assignment was not submitted to the Commission until July 29, 1963, a date subsequent to our Opinion in this proceeding. By letters dated August 20, 1963, addressed to the alleged assignee and attorney of record for Kilroy the Secretary of the Commission advised that, until the requisite filings have been made and the succession approved, Kilroy remains accountable for all refunds required by Opinion No. 398 in Docket No. G-17338. The import of those letters is hereby confirmed.

Kilroy also contends that in determining whether its proposed price was "in-line" we erred in not considering all contracts up to the date it commenced deliveries, rather than the date of its contract, "because until such deliveries commenced the gas had not been dedicated to the interstate market and the Commission did not have jurisdiction over Kilroy's sale to Hope." This contention is effectively answered in our order on the rehearing applications filed in *Skelly,* Opinion No. 362-A, wherein we stated that we used the date of the contract because we are of the opinion that the execution of the contract is the significant act on the part of buyer and seller in determining the price. Our conclusion is affirmed for the reasons expressed in that opinion and in the cases therein cited. We may note that our use of the date of execution of the contract to determine the "in-line" price was approved in *Atlantic Refining Co.* v. *F.P.C.,* 316 F. 2d 677 (CADC, March 21, 1963).

The Superior Oil Company asserts a rather novel contention in regard to our action in requiring refunds on the

basis of gas paid for but not yet taken by its pipeline purchasers. Referring to the Act's limitation in Section 1(b) to the transportation of natural gas in interstate commerce and to the sale in interstate commerce of natural gas for resale, it avers that the gas there involved has been neither sold nor delivered, and that any provision for failure to take this gas for transportation or sale in interstate commerce is beyond our regulatory powers. We cannot agree with such a hypertechnical approach. Assuredly, the gas has been sold—it has been paid for by Transco and United. While, as observed in the Opinion, some possibility of forfeiture of the prepaid volumes continues to exist, the possible occurrence thereof cannot be made a controlling consideration. Otherwise our jurisdiction could easily be evaded by sales for future deliveries subject to remote conditions subsequent. In our opinion, the gas has been sold in interstate commerce for resale and our regulation thereof is within the jurisdiction of the Act.

However, a further problem remains with respect to the refund obligation on the prepaid gas, one which we believe requires rectification. We speak here of the requirement in the Opinion and Order for immediate flow-through of refunds on the prepaid gas which may be taken in kind. As clarified by Transco in its application for rehearing, and confirmed on re-examination of the order issued February 2, 1962, approving settlement in Docket No. RP61-13, the settlement agreement (Article IV, as implemented by Article V(C)), includes adequate provisions for proper disposition of all contingent supplier refunds made to Transco, including payment of such refunds to its utility customers where warranted. A review of United's settlement agreement in Docket Nos. G-9547, *et al.*, approved by order issued March 12, 1962, likewise establishes that ample provision has been made (Article V, Appendix E) for flow-

through of refunds resulting from the permanent certificate granted in Docket No. G-16388. Accordingly, we shall amend ordering paragraph (E) of the Order accompanying Opinion No. 398 to the extent of deleting the last sentence thereof.

The New York Public Service Commission objects to the lack of an interest charge on the computation of refunds to be made in kind for prepaid gas. In our opinion, the absence of an interest charge is offset by the almost complete preclusion of any possibility of forfeiture on the volumes of refund gas (the time limitation being the life of the contracts) and by the fact that the volume of such gas is to be calculated at the conditioned initial price, regardless of whatever future price escalations may occur. Thus, Transco and United are accorded an assured volume of gas which they may take at their option at a minimum price.

The New York Commission, together with Long Island Lighting Company and The United Gas Improvement Company, protest the failure to order refunds of excess charges on the gas sold by Superior from offshore Vermilion Block 76 field prior to the issuance of the August 10, 1959 certificate. Our refusal to order the refund was based upon the fact that the temporary authorization which had been granted Superior on October 22, 1958, did not contain a refund condition. Thus, although Superior was informed that once service was commenced under the temporary authorization it could not be discontinued without permission of the Commission, there was nothing to alert it to the possibility that a refund might be required thereunder. For this reason we believe it would be inequitable to now require Superior to make the refund. The clarification of our position expressed in the opinion on rehearing in *Skelly*, which follows, is directly in point and suffices for disposition of the present claims:

A refund has been required when the permanently certificate rate is less than the temporary one, but in such a case specific language advising the parties of the risk they took if they accepted the temporary certificate has uniformly been used. Since in the present proceeding there is no such provision in the temporary certificates, to proceed now and order the producers to make refunds would not be equitable regardless of any ultimate right we may have to order such refunds.

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Placid Oil Company, Hassie Hunt Trust and Caroline Hunt Sands jointly urge error in the temporary moratorium placed by us on the price escalations. Their application points out that the gas involved in some of their dockets has been the subject of a Section 4(e) rate proceeding to determine the justness and reasonableness of increases from the initial price of 23.55 cents per Mcf to 25.55 cents per Mcf. These increases were disallowed by us in Opinion No. 369 [2] on the ground that the Hunt interests had failed to meet their burden of proof, specifically that the cost of service presentations were improper. Applicants now contend that "The purport of the Commission's Opinion No. 369 was that if the so-called deficiencies had been corrected, Applicants' 25.55 cent price would have been "just and reasonable". Assuming, without deciding this to be true, it does not meet the problem here. For we have held, for reasons which we here reaffirm, that it would not serve the public convenience and necessity to allow a price increase above the existing triggering rate pending conclusion of the area rate proceeding in AR61-2, even if such rate were indicated on the basis of individual company cost of service concepts. See *Superior Oil Co.* v.

[2] *H. L. Hunt, et al.*, Docket Nos. RI62-467, *et al.*, issued November 30, 1962, 28 FPC 897, rehearing denied by order issued January 15, 1963, 29 FPC, —, petition for review, CA 5, Nos. 20375 and 20386.

F.P.C., —— F. 2d ——, CA9, No. 18252, decided August 26, 1963 (slip op. p. 26). Since the temporary certificates issued these petitioners contained no such condition and the permanent certificate applications were still in hearing, we were not in a position to so hold at the time of Opinion No. 396.

As previously noted, applicants have included a motion to reopen the proceeding for the introduction of new evidence. This evidence, as outlined in their application, involves the recent increases in production of gas from the South Louisiana area, the amount of such gas which has moved in interstate commerce, growth of the Louisiana intrastate market, depth of reservoirs in South Louisiana, both industry-wide and those respecting Placid's production in this proceeding, and changes in well drilling costs. The evidence also attempts to differentiate Placid's position from the general statistics relating to production in the South Louisiana area. Opinion No. 398 rejected consideration of this type of evidence as irrelevant to the determination of the initial price question in independent producer certificate cases. Moreover, a large part of the information sought to be introduced at this late date either was or should have been available to petitioners earlier, or relates to periods considerably after the date of execution of the contracts, from which the in-line price must be judged. The motion will therefore be denied.

A number of the producer-applicants have requested stay of ordering paragraphs (B), (C), (D) and (F) pending the outcome of judicial review of the Opinion and Order. Paragraphs (B) and (C) relate to the filing of supplements to the presently effective rate schedules to reflect the

conditioned price as the initial price and to the imposition of the moratorium. Paragraphs (D) and (F) provide for

the making of the refunds within 60 days of July 17, 1963, the date on which Opinion No. 398 was issued. Except for the indicated modification in paragraph (E), our review of the applications for rehearing does not convince us that we were in error in our determinations or that continued collection of the initial contract prices, determined by us to be excessive, can be sanctioned. We do not believe the public interest will be adversely affected, however, by deferring payment of the refunds, with interest, for a period of 30 days after conclusion of judicial review of Opinion No. 398. Accordingly, we shall grant the motions for stay of ordering paragraphs (D) and (F). In all other respects the applications for rehearing and motions for stay will be denied.

The Commission finds:

(1) The assignments of error and grounds for rehearing and reopening set forth in the applications for rehearing filed herein present no facts or principles of law which were not considered by the Commission when it issued its Opinion No. 398, or which, having now been considered, warrant any change in, modification of, or rehearing of such Opinion and Order, except as specified below.

(2) The motion to reopen for the submission of additional evidence should be denied.

(3) Good cause exists for granting, in part, the motions for an amendment to the Order issued herein on July 17, 1963, so as to stay the actions required by ordering paragraphs (D) and (F) for a period of 30 days after conclusion of judicial review of Opinion No. 398.

The Commission orders:

(A) The applications for rehearing filed in the above-entitled proceeding are hereby denied.

(B) The last sentence of paragraph (E) of the Order is hereby deleted.

(C) The motion to reopen the proceeding is denied.

(D) The completion of the acts and compliance with the requirements set forth in ordering paragraphs (D) and (F) of the Order accompanying Opinion No. 398 are hereby stayed for a period of 30 days after the conclusion of judicial review of said Opinion.

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(E) In all other respects said Opinion and Order is confirmed.

By the Commission. Commissioners O'Connor and Ross dissenting in part filed separate statements appended hereto.

(SEAL)

Gordon M. Grant,
Acting Secretary.

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COMMISSIONER O'CONNOR, *dissenting in part:*

I believe the Commission should stay paragraphs (B) and (C) which require the producers to immediately reduce their rates, conditioned upon the producers' agreement to refund the difference between present and ordered rates if the order is upheld on review. This procedure would protect both consumers and producers pending judicial review, and would prevent the possibility of irreparable loss which the order now imposes upon the producers. Otherwise, I join the order.

/s/ L. J. O'Connor, Jr.

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COMMISSIONER ROSS, *dissenting in part*, for the reasons contained in his statement accompanying Opinion No. 398, issued July 17, 1963, Placid Oil Co., *et al.*, Docket Nos. G-13183, *et al.*, to the extent applicable.

/s/ Charles R. Ross
CHARLES R. ROSS

September 6, 1963

[619] In The United States Court of Appeals for the Fifth Circuit

No. 20872

CALLERY PROPERTIES, INC., PETITIONER

versus

FEDERAL POWER COMMISSION, RESPONDENT

No. 20885

THE SUPERIOR OIL COMPANY, PETITIONER

versus

FEDERAL POWER COMMISSION, RESPONDENT

No. 20890

CAROLINE HUNT SANDS AND LOYD B. SANDS, PETITIONERS

versus

FEDERAL POWER COMMISSION, RESPONDENT

[620] No. 20891

PLACID OIL COMPANY, PETITIONER

versus

FEDERAL POWER COMMISSION, RESPONDENT

No. 20892

MARGARET HUNT HILL, TRUSTEE FOR HASSIE HUNT TRUST, PETITIONER

versus

FEDERAL POWER COMMISSION, RESPONDENT

No. 20967

J. RAY MCDERMOTT & CO., INC., PETITIONER

versus

FEDERAL POWER COMMISSION, RESPONDENT

No. 20989

OCEAN DRILLING & EXPLORATION COMPANY, PETITIONER

versus

FEDERAL POWER COMMISSION, RESPONDENT

[621] No. 21028

J. R. FRANKEL, ET AL., PETITIONERS

versus

FEDERAL POWER COMMISSION, RESPONDENT

PETITIONS FOR REVIEW OF ORDERS OF THE FEDERAL POWER COMMISSION

Opinion—August 14, 1964

Before RIVES and BROWN, Circuit Judges, and GROOMS, District Judge

BROWN, *Circuit Judge:* These cases present important questions under the Natural Gas Act, 15 USCA § 717. These include the nature of the hearing and the scope of the pertinent evidence bearing on price in a § 7 application for permanent certificate, the legality of retroactive rate refund, and the validity of a moratorium on post-certificate § 4 price increases.

The cases are not new for us, certainly not, as to one case. Their presence here bears out the prediction of the dissenter[1] that "this case will be back several years and thousands of pages

[1] *United Gas Improvement Co.* v. *FPC*, 5 Cir., 1961, 290 F. 2d 133, 138, 147 (dissenting opinion).

later." [2] Without assaying the [622] balance of the dissenter's prophesy that "no one will know more than is known now," it is ironic that we hold that we do not know enough because the Commission declined to receive and evaluate important evidence. Thus, in their fifth year, these applications must now go back to have the kind of hearing which we, and other Courts of Appeals, directed.

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These are all fallout from Catco [3] in which the Supreme Court reversed the unconditioned certificate because the 21.4¢ price was "out of line."

Within a short time after affirmance by the Third Circuit on August 4, 1959, of the *Transco-Seaboard* case, [4] the FPC in 6 separate formal hearings involving a total of 69 producer applications issued unconditioned certificates for South Louisiana (and offshore) sales at initial contract prices ranging from 21.4¢ per Mcf where no tax reimbursement was due to 23.8¢ including tax reimbursement. But within 4 months, the Third Circuit's *Transco-Seaboard* decision was summarily reversed. [5] On appeals taken by various distributor-intervenors, the grant of the certificates was reversed [623] by this Court and Courts of Appeals for the Third, Ninth, Tenth, and D.C. Circuits. [6]

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[2] The certificate of the records shows that some of these ran as high as 10,000 pages, others 5,000 and 6,000. Counsel, with the responsible concern demonstrated by Federal Power practitioners, public and private, have reduced it to 617 printed pages under our special FPC practice which became the forerunner of our amended Rules 23 and 24. See *Hunt* v. *FPC*, 5 Cir., 1962, 306 F. 2d 334, 336, n. 1. The 17 briefs exceed 480 additional pages.

[3] *Atlantic Refining Company* v. *Public Service Commission of New York*, 1959, 360 U.S. 378, 79 S. Ct. 1246, 3 L. Ed. 2d 1312.

[4] *United Gas Improvement Co.* v. *FPC*, 3 Cir., 1959, 269 F. 2d 865.

[5] Sub nom. *Public Service Commission of New York* v. *FPC*, December 14, 1959, 361 U.S. 195, 80 S. Ct. 292, 4 L. Ed. 2d 237.

[6] The original Commission opinions, and the court reversals are as follows (present petitioners shown in parentheses):

(1) *Transcontinental Gas Pipe Line Co.*, Op. 315, 1958, 20 FPC 264, aff'd sub nom. *United Gas Improvement Co.* v. *FPC*, 3 Cir., 1959, 269 F. 2d 865, reversed mem. sub nom. *Public Service Comm'n of New York* v. *FPC*, 1959, 361 U.S. 195, 80 S. Ct. 292, 4 L. Ed. 2d 237 (Placid in No. 20891, Hill in No. 20892, and Frankel in No. 21028).

(2) *Texas Gas Transmission Corp.*, Op. 327, 1959, 22 FPC 378, reversed, *Public Service Comm'n of New York* v. *FPC*, D.C. Cir., 1960, 287 F. 2d 146, cert. denied, 1961, 365 U.S. 880, 882, 81 S. Ct. 1080, 1031, 6 L. Ed. 2d 192

On May 10, 1961, the FPC consolidated the remanded proceedings with the Southern Louisiana area rate proceeding.[7] On January 10, 1963, the FPC denied motions of some intervenor-distributors for security on [624] possible rate refunds. Expressing the view that it has "power to redetermine these proceedings on the basis of the respective records as originally made and in the light of additional facts of which we may take official notice" without further hearing, the Commission nevertheless determined to "adhere to the view that it would be fair and wiser in the present circumstances to offer the applicants a further opportunity to adduce evidence in docket numbers AR61–2 et al. in support of their proposed prices." But it ordered that rate collections "shall be subject to such refund provisions as the Commission may lawfully prescribe by its final order * * * to the extent, if any, that the rate which has been collected exceeds the rate ultimately found to accord with the requirements of the public convenience and necessity."[8] In overruling the petitions for rehearing, the FPC on March 7, 1962, severed the proceedings from AR61–2 and then "consolidated [them] for the limited purpose of determining the public

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(Callery in No. 20872, Sands in No. 20890, McDermott in No. 20967, and Ocean Drilling in No. 20989).

(3) *California Co.*, 1959, 22 FPC 252, reversed, *United Gas Improvement Co.* v. *FPC*, 9 Cir., 1960, 283 F. 2d 817, cert. denied, 1961, 365 U.S. 879, 881, 81 S. Ct. 1030, 6 L. Ed. 2d 191, 192 (Superior in No. 20885).

(4) *Sun Oil Co.*, 1959, 22 FPC 351, reversed, *United Gas Improvement Co.* v. *FPC*, 5 Cir., 1961, 290 F. 2d 133, cert. denied, 1961, 368 U.S. 823, 82 S. Ct. 41, 7 L. Ed. 2d 27.

(5) *Sunray Mid-Continent Oil Co.*, 1959, 22 FPC 361, reversed, *United Gas Improvement Co.* v. *FPC*, 10 Cir., 1961, 287 F. 2d 159.

(6) *Superior Oil Co.*, 1959, 22 FPC 369, reversed, *United Gas Improvement Co.* v. *FPC*, 5 Cir., 1961, 290 F. 2d 147, cert. denied, 1961, 366 U.S. 965, 81 S. Ct. 1926, 6 L. Ed. 2d 1255 (Superior in No. 20885).

[7] Docket No. AR61–2, 26 Fed. Reg. 4296 (1961).

The area pricing was initiated by Statement of General Policy No. 61–1, issued September 28, 1960. 24 FPC 818 (1960); 18 C.F.R. § 2.56 (1961). By the First Amendment to Statement of General Policy No. 61–1, issued October 25, 1960, the FPC fixed an area price level of 21.5¢ per Mcf plus tax reimbursement. 25 Fed. Reg. 10,488 (1960). Subsequently, by the Fourth Amendment to Statement of General Policy No. 61–1, issued October 23, 1961, the FPC reduced the area price level for initial sales of gas from South Louisiana to 21.25¢ per Mcf, inclusive of tax reimbursement. 26 Fed. Reg. 10,342 (1961).

[8] Superior (our Case No. 20885—see Items (3), (6), note 6, supra, was not a party to this order.

interest, initial price, or prices, applicable to these proceedings." * In this order of March 7, 1962, the FPC noted that six weeks earlier, in the remanded Catco dockets, it had found the in-line level in south Louisiana to be 18.5¢ per Mcf, plus 1.5¢ tax reimbursement where applicable. Rejecting contentions by intervenor-distributors that a like finding should peremptorily be entered in these proceedings, the Commission nonetheless concluded that [625] it "should afford the producers further opportunity to be heard."

The hearings thus scheduled were held before an Examiner June 18–21, 1962. At the outset of the hearing, the producers sought to introduce what the Examiner described as "a tremendous mass of cost-type, economic and financial evidence." This cost-of-service evidence followed generally the pattern used by the Commission in prior determinations. Broadly speaking it demonstrated that on a cost-of-service basis the cost to the producers was considerably in excess of the contract price sought to be certificated in the pending applications. Other evidence bore upon the minimum financial requirements for finding and producing gas. These also used techniques and methods employed by the Commission in determining analogous minimum financial requirements. Other evidence showed the demand and supply situation existing both nationwide and in South Louisiana. Some was detailed, indicating that the demand for gas is increasing far in excess of the annual additions of gas supply. Other evidence tied this directly into the exploration for, and finding of, new gas supplies to meet the increased demands, the relation of field prices to those efforts, the impact of lowered prices on exploratory activity, and the like. Other evidence showed the nationwide increase in the current cost of new gas supply over the pre-Catco prices, the increase in the weighted average contract price in this period in relation to drilling and exploratory costs, and refutation of the assertion that contract prices in South Louisiana have leaped from plateau to plateau. [626] We need not describe it in any greater detail since in affirming the Examiner's rejection of the evidence, the Commission characterized it as "economic and financial evidence" including that relating to "an individual

* Petitions to review the refund-warning order of January 10, 1962, were dismissed by us "without prejudice to the rights of petitioner to attack the validity of the orders * * * in petitions to review, * * * the orders of July 17, 1963, in the Commission's Opinion No. 398."

company or on an area-wide basis" without regard to whether it was "the type characterized as cost-of-service studies, cash flow studies, demand-supply, cost, profit and market price trends, area cost-revenue trends, comparative well cost data and gas replacement costs * * *."

On the motion of the intervenor-distributor supported by Commission staff, the Examiner rejected all of this evidence. In his decision of December 7, 1962, he (1) concluded that the in-line price for the pending sales was 18.5¢ per Mcf plus 1.5¢ per Mcf tax reimbursement where applicable, (2) directed that the producers refund, with interest, all amounts previously collected in excess of the in-line levels of 18.5¢ and 20.0¢.[10] Accepting in the main all of the Examiner's findings and conclusions, the FPC by opinion 398, issued July 17, 1963, took these actions. It unanimously sustained the exclusion of producer cost data, and the finding that the in-line price was 18.5¢. By a 4–1 vote it approved the refunds.[11] In addition, the Commission—on the basis of finding that rate filings to levels in excess of 23.55¢ per Mcf would cause widespread triggering throughout [627] Southern Louisiana—imposed a moratorium on filings in excess of 23.55¢ until July 1, 1967, or until the conclusion of the pending Southern Louisiana AR61–2 proceeding, whichever is earlier.[12]

Petitions for review have been filed by the producers (see note 6, *supra*). The questions presented for our decision are these. (1) Did the Commission err in excluding the proffered cost and economic data evidence? (2) Did the Commission err in imposing a moratorium on price increases in a permanent certificate? (3) Did the Commission err in ordering refunds of the amounts previously collected? (4) Did the Commission

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[10] The Examiner rejected a number of contentions of Staff and intervenor distributors, one of the Staff being that "excess" payments made to the producers under "take-or-pay" provisions for gas not delivered should be refunded.

[11] Refunds by Superior for collections under one temporary certificate prior to August 10, 1959, were excused based on the FPC's decision *Skelly Oil Co.*, Op. 362, 1962, 28 FPC 401, subsequently reversed in *Public Service Commission of New York* v. *FPC*, D.C. Cir., 1964, 329 F. 2d 242.

[12] The FPC rejected Staff's contentions on refund of take-or-pay prepayments, but it conditioned the certificates upon the ultimate outcome of a pending rule-making proceeding, R–199, review of which was recently held to be premature by the D.C. Cir., 1964, 329 F. 2d 242, 248.

err in fixing the in-line price at the 18.5¢ level? (5) Did the Commission err as to take-or-pay refund provisions? (6) Did the Commission err in making the refund order applicable to Frankel and Placid's Docket No. 13184?

II

Exclusion of Cost Evidence

We think that a proper consideration of the Act and its elucidation in Catco demonstrates that the Commission erred in rejecting the proffered evidence on cost and other economic data. No doubt Catco is significant and binding, and we accept it without any effort to whittle it down. But the simple fact remains that it is a statute which we are expounding, and the statute does not refer to, much less speak of "in-line" [628] price. To be sure, whether a proposed price is in-line or not is an important, sometime decisive, factor. But it is a factor to be weighed along with others in determining whether the proposed sale of gas in interstate commerce "is or will be required by the present or future public convenience and necessity." [13]

In the Commission Catco proceeding the Commission, presumably reasoning that a post-certification § 5 rate hearing would afford ample protection against improvident prices, declined altogether to consider the reasonableness of the proposed price or its relation to public convenience and necessity. This approach seemed to find some basis in the structure of the Act in which the statutory provisions concerning rates were found

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[13] Section 7(e), 52 Stat. 824, as amended, 56 Stat. 84, 15 USCA § 717f(e) provides:

"* * * [a] certificate shall be issued to any qualified applicant therefor authorizing the whole or any part of the operation, sale, service * * * covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of * * * the Act and the requirements, rules and regulations of the Commission thereunder, and that the proposed service, sale, operation * * * to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require."

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in §§ 4 [14] and 5 [15] and not in § 7 which dealt with the initial [629] application for certification, temporary or permanent. This argument acquired some operational support from the magnitude of the administrative problems, both in time and manageability, of turning every § 7 application into a full blown rate hearing to determine whether the proposed rate was "just and reasonable."

The Supreme Court in Catco forcibly rejected this approach of the Commission. The Court made clear that price was indeed important. It recognized, of course, that "the Act does not require a determination of just and reasonable rates in a § 7 proceeding * * *" or "that a 'just and reasonable' rate hearing is a prerequisite to the issuance of producer certificates." And the Court pointed out that it was the delay in processing § 5 pro-[630]ceedings that "requires a most careful scrutiny and

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[14] 15 USCA § 717c.

"4(a) All rates and charges made, demanded, or received by any natural-gas company for * * * the transportation or sale of natural gas * * * shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

"* * *

"(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission * * * schedules showing all rates and charges for any transportation or sale * * * together with all contracts which in any manner affect or relate to such rates, charges, classifications and services.

"(d) Unless the Commission otherwise orders, no change shall be made * * * in any such rate * * * except after 30 days' notice to the Commission and to the public * * *.

"(e) Whenever any such new schedule is filed the Commission shall have authority * * * to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing * * * may suspend the operation of such schedule * * * but not for a longer period than five months. * * * Where increased rates or charges are thus made effective, the Commission may * * * require the natural-gas company to furnish a bond * * * to refund, with interest, the portion of such increased rates or charges * * * found not justified. * * *."

[15] 15 USCA § 717d.

"5(a). Whenever the Commission, after a hearing * * * shall find that any rate, charge * * * collected by any natural-gas company * * * is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge * * * practice or contract to be thereafter observed and enforced and shall fix the same by order: * * *; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates."

responsible reaction to initial price proposals of producers under § 7." But the Court immediately tied price to public convenience and necessity by requiring that the price "proposal must be supported by evidence showing their necessity to 'the present or future public convenience and necessity' before permanent certificates are issued." The recent increase in the price levels, the Court went on, "does make price a consideration of prime importance" and "where the application on * * * presentation of evidence signals the existence of a situation that probably would not be in the public interest, a permanent certificate should not be issued." After stressing "public convenience and necessity" not less than six times in the space of two paragraphs, 360 U.S. 378, at 390–91, the Supreme Court for the first time articulates the "in-line" concept. "Where the proposed price is not in keeping with the public interest because it is out of line or because its approval might result in a triggering of general price rises or an increase in the applicant's existing rates by reason of 'favored nation' clauses or otherwise, the Commission in the exercise of its discretion might attach such conditions as it believes necessary." 360 U.S. 378, at 391.

The Court stressed that by certificate conditions under § 7, "the consuming public may be protected while the justness and reasonableness of the price fixed by the parties is being determined under other sections of the Act. Section 7 procedures in such situations thus act to hold the line awaiting adjudication of a just and reasonable rate." 360 U.S. 378, at 392. Of unusual im-[631]portance here was the Court's statement in the analysis of the deficiencies of that record in which "no effort was made to give the 'reason why' * * * the proposed price was some 70% higher than the weighted average cost of 'existing gas to the purchaser.' "

As though Catco began and ended with "in-line" the Commission and the intervenor-distributors are mesmerized by this catch phrase into supposing that the Commission's responsibility is discharged with that limited inquiry and if unsatisfied on that score, it is free to reject out of hand a producer's application for a new service. Catco did not so hold, and this approach ignores the plain terms of the statute which are no way diminished by Catco. Vast as is the discretion of the Commission, the statute, § 7(e), footnote 13, *supra*, accords positive rights to natural gas producers desiring to sell gas in interstate

commerce. A producer does not, of course, have an absolute right to engage in the sale. It does, however, subject to compliance with reasonable procedural rules and requirements of the Commission [16] have an absolute right to a consideration of the application by the Commission and the right to have it granted "if it is found that the applicant is able and willing properly to do the acts and to perform the service * * * and the * * * sale * * * is or will be required by the * * * public convenience and necessity." The Commission does not, therefore, fulfill its statutory duty by the limited inquiry into whether the price is "in-line." Conversely, it has no power to deny the application solely on the ground that [632] the price is not "in-line." To be sure, if the proposed price is not "in-line," this may become the dominant factor in denying the application. But it must be done as a part of the larger element of "public convenience and necessity." The Court makes this clear in *FPC* v. *Transcontinental Gas Pipe Line Corp.*, 1960, 365 U.S. 1, 8, 17, 22, 81 S. Ct. 435, 5 L. Ed. 2d 377: "In fact in interpreting this very section we said that 'Sec. 7(e) requires the Commission to evaluate all factors bearing on the public interest' * * *." Later, the Court states, "In this connection, it must be realized that the Commission's powers under Section 7 are, by definition limited. * * * The Commission cannot order a natural gas company to sell gas to users that it favors; it can only exercise a veto power over proposed transportation and it can only do this when a balance of all the circumstances weighs against certification." [17]

In the concept of pubic convenience and necessity, price is, of course, very important. But it is not the whole thing. And certainly under a statutory scheme for a utility-type of regula-

[16] *FPC* v. *Texaco, Inc.*, 1964, — U.S. —, — S. Ct. —, 12 L. Ed. 2d 112.

[17] Rejecting the Respondent's claim that the Commission had used its power to prevent a levering upward of field prices to bar direct sales of gas, it said: "Certainly such action would be contrary to our previous statements that the term 'public convenience and necessity', connotes a flexible balancing process, in the course of which all the factors are weighed prior to final determination. *United States* v. *Detroit & Cleveland Navigation Co.*, supra." * * * as the Commission stated 'countervailing factors suffice to tip the balance against the grant of the authority requested by Transco.'"

Footnote 19 reads: "19. Compare the cases which have held that it was error for the Commission to refuse to consider certain factors within its power of notice. E.g., *City of Pittsburg* v. *Federal Power Commission*, 99 U.S. App. D.C. 113, 237 F. 2d 741."

tion for the sale, not of a [633] service, but of a depletable commodity,[18] where the Commission serves primarily as a rate-reviewing, not a rate-fixing agency,[19] and in which the entry into the regulated market is the voluntary act of the gas producer,[20] it is perfectly evident that many factors other than price alone bear upon public convenience and necessity and, in turn, upon price.

One of the most critical factors is, of course, the extent and nature of the demand. We decline to believe that the FPC can be oblivious to what all others know firsthand of occurrences since 1956–57, the era that begat the so-called Catco "in-line" price. Population is increasing at explosive rates particularly in metropolitan areas in the South, Southwest and West Coast. What are, for example, the insatiable energy requirements of this ever-expanding population and industrial complex? If the demand is present, the next decisive question is, what about the supply? Can it reasonably be met by the gas now under dedication? Where and from what sources can the demand reasonably be satisfied? And whether this does, or does not, bring about price increases, the decisive question then becomes what price will it take to get the needed gas? The latter question, of course, sets in train a whole series of subsidiary inquires. This is so because even under a system of [634] voluntary initial dedication of gas, the acceptable price may not be measured by the intransigent demand of a producer. Inherent reasonableness in terms, say, of the likelihood that the needed supply of gas will be obtainable from others by exploration and new production and other similar questions would remain. Other factors could be named.[21] The important thing is that price is not the sole criteria.

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[18] Chief Judge Tuttle has pointed out: "This is concededly a difficult standard to specify especially in light of the fact that producers are in reality selling gas which they own and are not, in the traditional sense, primarily furnishing a service to the public." *Gulf Oil Corp.* v. *FPC*, 5 Cir., 1958, 255 F. 2d 556, 557.

[19] *United Gas Pipeline Co.* v. *Mobile Gas Service Corp.*, 1956, 350 U.S. 332, 76 S. Ct. 373, 100 L. Ed. 373.

[20] *FPC* v. *Hunt*, 1964, — U.S. —, — S. Ct. —, 11 L. Ed. 2d 878, 883.

[21] Several factors were mentioned just this term in *FPC* v. *Hunt*, 1964, — U.S. —, — S. Ct. —, 11 L. Ed. 2d 878. The Court there concluded that the purpose as revealed by the legislative history was to give the FPC "an opportunity to scrutinize the financial setup, the adequacy of the gas reserves, the feasibility and adequacy of the proposed services, and the characteristics of the rate structure."

A price-only approach does more than substitute for the statutory standard of "public convenience and necessity" a rigid, mechanical arithmetical guide. It is conceivable that such a test could imperil the public interest by foreclosing needed gas from the interstate market solely because the price is out of line. The so-called "in-line" concept necessarily involves a question of time—here in the neighborhood of 1956–57 prior to the contaminating influence of the initial Catco contract. It involves also a selection of so-called comparables and a rejection of those which are either "too high," or are thought to be so, or are otherwise "suspect." [22] Essential as it is that the Commission scrutinize carefully apparent price increases, it is inconceivable that Congress mea[illegible]o freeze the rates to 1956–[635]58,[23] or to any other particu[illegible] time for that matter.[24]

Rather, the public interest is protected by requiring the Commission to consider price in terms of the whole public convenience and necessity. Indeed, this was recognized by the Ninth Circuit in one of the very cases precipitating the remands now under review.[25] That Court rejected as being "without merit" the "contention that the price line must necessarily accord with the pre-Catco line." The Court went on, "we agree with the view expressed by the Commission in *Texas Gas Transmission Corp. et al.*, 22 FPC 378, 388, that factors such as increased production costs since CATCO, comparative accessibility of field locations and comparative depth of sands tend to make pre-CATCO prices irrelevant for comparative purposes in other

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[22] See Morris, Recent Independent Producer Certificate Cases: The "Suspect Order" Rule, 32 Geo. Wash. Law Rev. 489 (1964); *Amerada Petroleum Corp.*, Op. No. 422, 1964, — FPC — [Nos. CI62–1544, March 23, 1964].

[23] The 18.5¢ per Mcf price fixed here was the figure previously determined to be appropriate in the remanded Catco case, 1962, 27 FPC 96. This line was actually a 1956 level.

The Commission forecasts that the area proceedings will result in just and reasonable rates. But it recognizes that "[to hold the line] does not mean that irrespective of evidence to the contrary an absolute price freeze is to be imposed until some future date when area proceedings ultimately establish 'just and reasonable' rates."

In re *Amerada Petroleum Corp.*, Op. 422, 1964, — FPC —, — [Docket No. CI62–1544, March 23, 1964].

[24] Indeed, the very nature of present and future public convenience and necessity forbids a look-back to 1956–57 only. The inquiry must include the time of the [illegible]d. *FCC* v. *Pottsville Broadcasting Co.*, 1940, 309 U.S. 134, 145, 60 S. Ct. 437, 84 L. Ed. 656; *Easton Publishing Co.* v. *FCC*, D.C. Cir., 1950, 185 F. 2d 987, 991.

[25] See (3), note 6, supra.

cases." *United Gas Improvement Co.* v. *FPC*, 9 Cir., 1960, 283 F. 2d 817, 823. Earlier that Court stated that "* * * the Commission properly refers to circumstances under which an unconditional and permanent certificate might [636] be issued notwithstanding the fact that the proposed price is out of line." 283 F. 2d 817, 821.

And this same theme was echoed by each of the other remanding Courts. "It is conceivable," said the Tenth Circuit, "that in some circumstances public convenience and necessity may require certificating of a sale when the price is 'out of line.' " [26] The D.C. Circuit pointed out alternative courses for the Commission where the "prices * * * are suspiciously higher." One course was to impose interim conditions. As to the other, it offered this solution. "On the other hand, it [the Commission] may grant unconditional certification upon evidence sufficient to 'support a finding of public convenience and necessity.' " [27] We spoke in terms of burden making "it * * * clearly incumbent on the proponent of [the proposed] rate to make some showing of the 'reason why' (as it was expressed in the Catco opinion) * * *," the proposed rate was a proper initial rate in view of rates half that high just a few years before.[28]

Evidence of the kind proffered by these petitioners bore upon these questions of public convenience and necessity. That the evidence would, in whole or in part, [637] be pertinent to a § 4 or § 5 "just and reasonable" rate hearing is a matter of no decisive significance. If it proves too much, or proves too little, this is a matter calling for the expert evaluation and judgment of the Commission.[29] We have no fear that with resourceful

[26] *United Gas Improvement Co.* v. *FPC*, 10 Cir., 1961, 287 F. 2d 159, 163.

[27] *Public Service Commission* v. *Federal Power Commission*, D.C. Cir., 1960, 287 F. 2d 146, 149. The Court then remanded as follows: "The order, insofar as it grants unconditional certification to the initial price proposals of the producer applicants, is reversed and the case is remanded to the Commission for further proceedings in which the producer applicants may, if they so choose, either augment the record so as to support a certification without price condition, or seek certification appropriately conditioned." 287 F. 2d 146, at 150.

[28] *United Gas Improvement Co.* v. *FPC*, 5 Cir., 1961, 290 F. 2d 133, 138.

[29] The argument that to receive evidence of this nature is to allow a producer a fair rate of return on excessive costs is a non sequitur. We agree with Judge Wright that "The Commission is not required to subsidize high cost producers with consumers' money." *Atlantic Refining Co.* v. *FPC*, D.C. Cir., 1963, 316 F. 2d 677, 680. But whether costs are "too high" or

ingenuity the Commission can develop procedural devices which will keep these § 7 hearings from being bogged down into the full dress § 4 or § 5 rate hearing. Its awesome task calls for great administrative inventiveness which will assure to all, producer, consumer, and public alike, the full measure of statutory rights. *Hill* v. *FPC*, 5 Cir., 1964, — F. 2d —, —, n. 27 [Nos. 20375, 20386, July 23, 1964].[20]

[638] The task facing the Commission in this developing field calls for innovation and adaptation. It is not, therefore, enough merely to inquire whether the price is "in-line." On the other hand, for § 7 purposes, there need not be a full dress § 4 or § 5 rate hearing. The Commission must, however, hear and evaluate all relevant evidence bearing on public convenience and necessity when it is urged, or held,[21] that the proposed price is out of line.[22]

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even "high" are comparative factual matters calling for evidence and evaluation.

[20] Following the Supreme Court's lead in its admonition that the Commission must find ways to expedite proceedings, we there pointed out that much delay flows from an overuse of motions to dismiss instead of an evaluation of evidence for its intrinsic worth in the light of the Commission's expertise. The instant cases graphically illustrate that a motion to strike evidence relating to complex activities is an equally awkward procedural device of limited utility. For all we know, had the Commission received the proffered evidence, it would have held it to be wanting, and that might well have been the end of the matter. Now the case must go back and proceed through lengthy hearings, rehearings, exceptions, arguments before the Commission, rehearings and reargument to receive and evaluate this very evidence. In terms of time and the public interest, the apparent time-saving device of striking this evidence as irrelevant has proved again that the shortest way through is often the longest way around. Determining the utter and irretrievable irrelevance of a large body of evidence under the nuances of a concept as elusive as public convenience and necessity is indeed a summary procedure. And we have many times pointed out that summary procedures "present a treacherous record for deciding issues of far-flung import, on which * * * [Courts] should draw inferences with caution from complicated courses of legislation * * * and practice." *Kennedy* v. *Silas Mason Co.*, 1948, 334 U.S. 249, 257, 68 S. Ct. 1031, 92 L. Ed. 1347: *Chapman* v. *Hawthorne Flying Service*, 5 Cir., 1961, 287 F. 2d 539, 541.

[21] Nothing will keep the Commission from doing this by a two-step proceeding. See *Hill* v. *FPC*, supra. Indeed, this Court has recently approved separate trial by separate juries of validity-infringement on the one hand and damages on the other in patent cases. *Swofford* v. *B. & W., Inc.*, 5 Cir., 1964 — F. 2d — [No. 21024, July 28, 1964].

[22] The evidence relating to cash outflow and replacement cost proffered and rejected in *Public Service Commission of New York* v. *FPC*, D.C. Cir., 1964, 329 F. 2d 242, was much more limited than that here. Nor do we

III

Price Moratorium

So far as rates are concerned, the Commission did two principal things. First it conditioned the permanent certificate on a reduction of the initial rate to 18.5¢ per Mcf. Second, it found that there was a triggering [33] at 23.55¢, and in order to prevent retriggering, it [639] prohibited the producers from exercising their contract rights to file rate increases above 23.55¢ until the conclusion of AR61–2 or July 1, 1967, whichever is earlier. That moratorium does permit, however, increases from 18.5¢ up to 23.55¢.[34]

Although the Supreme Court stated that the "extent of [the] power [to condition price changes] in permanent certification is not before us now," we think the full import of its recent decision, reversing this Court, *Federal Power Commission* v. *Hunt*, 1964, — U.S. —, 84 S. Ct. —, 11 L. Ed. 2d 858, 886, compels a holding that the Natural Gas Act forbids a moratorium on price increases as a condition to the issuance of a permanent certificate.

Of course the statute gives the Commission the power to attach "such reasonable terms and conditions" to the issuance of the certificate "as the public convenience and necessity may require." See footnote 13, *supra*. Literally, no distinction is made between temporary and permanent certificates. And undoubtedly there are a number of conditions which lawfully may be attached to the issuance of a permanent certificate.[35] But as the Court did there, when we examine the interplay between § 7 on certification and §§ 4 and 5 on "just and reason-

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regard *California Oil Co.* v. *FPC*, 10 Cir., 1963, 315 F. 2d 652 (inquiry as to what the line was); *Atlantic Refining Co.* v. *FPC*, D.C. Cir., 1963, 316 F. 2d 677 (question of in-lineness stipulated to be sole issue), as holding contrary to our decision.

[33] Some of the proffered but rejected evidence, see Part II, supra, actually touched on the factual basis, or lack thereof, of the Catco assumption that "new price plateaus will * * * be created." 380 U.S. 378, at 390. We assume, however, that there was a factual basis for the Commission's finding.

[34] The moratorium has a present impact. See, e.g., Superior's contract with United permitting escalation to 23.5¢ plus 2.3¢ tax reimbursement.

[35] — U.S. —, — S. Ct. —, 11 L. Ed. 2d 878, 885, n. 3.

able" rates and rate changes, we think that Congress did not intend that the Commission have the power by a certificate condition to supersede the working of § 4. By § 4 Congress established a statutory [640] scheme in which rates are prescribed and become effective by contractual provision. *United Gas Pipeline Co.* v. *Mobile Gas Service Corp.*, 1956, 350 U.S. 332, 76 S. Ct. 373, 100 L. Ed. 373; *United Gas Pipeline Co.* v. *Memphis Light, Gas & Water Division*, 1958, 358 U.S. 103, 79 S. Ct. 194, 3 L. Ed. 2d 153.

There is no real question about the operative process or effect of § 4(e). Subject only to suspension for a limited brief period of time and the obligation to refund on final determination, the rates prescribed in the contract become effective when filed. The only real problem is the point at which the rights of a producer and the powers of the Commission under § 4 become applicable. This the Court answers squarely in *Hunt*. "Under the procedures of the Act, it is at the point of permanent or unconditional temporary certification that the provisions of § 4 become applicable." — U.S. —, — S. Ct. —, 11 L. Ed. 2d 878, at 884. It is at that point that "the gas has been permanently certificated into interstate commerce * * *" and, the Court continues, at that point "the independent producer is then free to pursue the rate filing procedure of that section."

Other parts of the opinion make clear that the critical distinction is between the temporary, conditional certificate, on the one hand, and a permanent certificate on the other. Thus the Court points out, "once a permanent certificate is granted, the Commission can correct an improper rate only under § 5 of the Act * * *," — U.S. —, 11 L. Ed. 2d 878, 883. In view of the necessity for some character of certificate before [641] the gas "can move into interstate commerce" and the statutory right to apply "for temporary authorization" the Court recognizes that "* * * the Commission must have the authority to condition a temporary certificate so as to avoid irreparable injury to affected parties." But, the Court goes on, this "* * * condition, once imposed, continues only during the pendency of the producer's application for a permanent certificate." — U.S. —, 11 L. Ed. 2d 878, 884. And some of the more sweeping statements made in Catco [36] where reference was made to conditional certificates without indication as to permanent or temporary must now be read as conditional *temporary* certificates. For the Court, immediately preceding an extensive

quotation from Catco, put its own characterization on the nature of the certificates being dealt with in Catco when it said, "this Court previously discussed the use of the temporary certificate procedure in" Catco. [Emphasis supplied.] — U.S. —, 11 L. Ed. 2d 878, 884.

The correctness of our holding is demonstrated by the peculiar facts of this record. For applications filed in 1958,[37] the Commission asserts the power to compel the producer to sell gas for nearly ten years [38] at a price [642] substantially less than the opening contract price and without the opportunity of being able to ever seek and obtain the automatic stepped up price increases provided for in the contract. Thus, for nearly half of the two [illegible]-year contract period [39] through the guise of a "price" condition, the Commission obtains an irrevocable dedication [40] of the gas to interstate sale and an effectual denial of any opportunity for the producer to exercise the legislative right to file, subject to suspension and refund, contractual rate increases. If the Commission may do it for half of the period, there is no reason why it may not do so for all. Congress could hardly have intended to delegate the power of legislative repeal by any such easy route.

Actually, the Commission's argument for moratorium power harkens back to the like contention made to support exclusion of pertinent economic data discussed in Part II above. Here, as there, it insists that it must have the power to impose a price

[36] 360 U.S. 378, 79 S. Ct. 1246, 3 L. Ed. 2d 1312.

[37] The Placid and McDermott applications, filed September and December 1958, are typical. There were some as early as April 1957.

[38] The moratorium runs until July 1, 1967, or until any earlier final decision in AR61-2. AR61-2 is still going strong. Its earlier counterpart, the Permian Basin hearing, AR61-1, is pending for decision before the Examiner. The briefs inform us that Chairman Swidler has stated that it will be March of 1965 before 61-1 is decided by the Examiner and the end of 1965 before 61-2 is forthcoming. Oil & Gas Journal 62 (March 16, 1964). A minimum of two years more will be required before they grind through Commission review to land in some Court of Appeals for judicial review. See *Wisconsin* v. *FPC*, 1963, 373 U.S. 294, 83 S. Ct. 1266, 10 L. Ed. 2d 357; *FPC* v. *Texaco*, 1964, — U.S. —, 84 S. Ct. —, 12 L. Ed. 2d 112, 119, n. 13.

[39] Superior's contract with United covering Bayou Penchant and other leases in Terrebonne Parish and the November 1, 1957, contract between Hassie Hunt Trust and Transco appear to be typical.

[40] Since all petitioners have made sales, none is free to withdraw its reserves from dedication. *J. M. Huber Corp.* v. *FPC*, 3 Cir., 1956, 236 F. 2d 550.

moratorium because the alternative is either to force a full blown § 4 or § 5 "just and reasonable" rate hearing, which is an unmanageable administrative problem, or exclude the needed gas from the market until such time as such a hearing can be conducted. But as there, we fail to see [643] that it is a case of either or. If the kind of hearing which the particular facts of a particular application require [41] for determination of "public convenience and necessity," it is to be assumed that the Commission will issue a permanent certificate only if the initial contract price is in line or, if out of line, meets the statutory standard of public convenience and necessity. Full protection to the consumer is thereafter accorded so far as subsequent contract rate increases are concerned under the suspension and refund procedures of § 4(e). If, in that situation, there might be some further triggering impact, then that would flow from the unique statutory scheme which Congress, not the Commission nor the Courts, are free to change no matter how unsound some might think it to be.

The Commission's brief recognizes that it "is true that in *CATCO, Texaco, Inc.* v. *FPC* * * *, *Atlantic Refining Co.* v. *FPC* and *California Oil Co.* v. *FPC* cited by [certain of the petitioners] the Courts assumed that any rate increases contractually permitted could be filed under Section 4 at any time after operations were commenced under a certificate." [42] But it treats these as judicial aberrations resulting presumably from a failure on the part of the Commission "to meet its hold-the-line obligation by a moratorium condition." This [644] leads the Commission's counsel to claim the necessity for, and the existence of, a power to take whatever action, impose whatever conditions to assure that "excessively high prices are absolutely prevented from being charged." But no matter how commendable that policy may be, the Commission may not supersede § 4 to accomplish it.

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[41] There are no hard and fast rules. Adaptation is the order of the day in this undulating field. See *Hill* v. *FPC*, 5 Cir., 1964, — F. 2d — [Nos. 20375, 20386, July 23, 1964].

[42] Commission Br. 39. The cases referred to are: *Catco*, 360 U.S. 378; *Texaco, Inc.* v. *FPC*, 5 Cir., 1961, 290 F. 2d 149, 156; *Atlantic Refining Co.* v. *FPC*, D.C. Cir., 1963, 316 F. 2d 677; *California Oil Co.* v. *FPC*, 10 Cir., 1963, 315 F. 2d 652, 660; see also *Willmut Gas & Oil Co.* v. *FPC*, D.C. Cir., 1961, 294 F. 2d 245.

IV

Retroactive Refunds

After fixing the initial price at 18.5¢ per Mcf, the Commission in its conditions also required that the producers refund, with interest, the excess over that figure which had been collected under the judicially reversed unconditioned certificates.

The producers make three principal attacks on this refund order. The first one—that the intervenor-distributors should have sought to stay gas deliveries pending determination in the respective Courts of Appeals [45] of their petitions for review—has little merit. Quite apart from any problem of whether intervenor-distributors could have met applicable standards for a stay,[46] the producers' plight was not brought about by the failure of the petitioning intervenors to obtain a stay, but came from the action of the producers in [645] making the deliveries under certificates which, though final, were then under direct judicial attack and subject as any competent Power Commission counsel would know, to the possibility of judicial reversal. The risk inherent in making deliveries pending final judicial determination was obvious to the producers. It was up to them to seek interim protective relief from the Commission, and there is no indication that extensions of time or other appropriate relief would have been declined by the Commission.

In the second attack some petitioners [47] apparently contend that the Commission could not order refunds because the original unconditioned certificates were not "vacated" or "set aside" by the Courts. Other petitioners urge the opposite—no refund right because certificates were "vacated." The wording of the remand orders vary, those of the Ninth Circuit,[48] Tenth Circuit,[49] and this Circuit [50] spoke in terms of "vacating" or "setting

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[45] See note 6, supra.

[46] The intervenors stress, for example, *Virginia Petroleum Jobbers Association* v. *FPC*, D.C. Cir., 1958, 259 F. 2d 921; *Eastern Airlines, Inc* v. *CAB*, 2 Cir., 1958, 261 F. 2d 830; *Airport Commission of Forsyth County* v. *CAB*, 4 Cir., 1961, 296 F. 2d 95, 96; *Associated Securities Corp.* v. *SEC*, 10 Cir., 1960, 283 F. 2d 773, 774–75; and *Armour & Co.* v. *Freeman*, D.C. Cir., 1962, 304 F. 2d 404, 406–08, 418.

[47] See, e.g., No. 20089 (Ocean Drilling), No. 20672 (Callery), and No. 20891 (Placid).

[48] 283 F. 2d 817, at 826.

[49] 287 F. 2d 159, at 163.

[50] 290 F. 2d 133, at 138; 290 F. 2d 147, at 149.

aside," whereas those in the D.C. Circuit [49] and the Third Circuit, following the Supreme Court's mandate,[50] spoke in terms of being remanded for further proceedings. But we agree with the Commission that by the choice of one rather than the other terminology, the remanding Courts intended no distinctive difference in effect.[51]

[646] The third, and serious, attack made by all is that the operative effect of the refund is that of a reparation order.[52] Under the structure of the Act, it has long been recognized, and never questioned, that "* * * under the Act the Commission has no power to make reparation orders. And its power to fix rates admittedly is limited to those 'to be thereafter observed and in force.'" *FPC* v. *Hope Natural Gas Co.*, 1944, 320 U.S. 591, 618, 64 S. Ct. 281, 88 L. Ed. 333.[53]

Although, as we point out shortly, these principles call for a special adaptation in the refund order, we think that the petitioners ignore the unusual circumstances of this case. By the remand orders (note 6, *supra*), all of the Courts of Appeals held that the unconditioned permanent certificates were improperly issued. It is one thing for a Court to rule that under a valid certificate the Commission lacks the power to retrospectively review rates and impose retroactive refund orders. It is quite another for a Court to conclude that a Commission lacking the power to do the former may yet not have inherent power to recapture the fruits obtained under an invalid, that is illegal,

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[49] 287 F. 2d 146, at 150.

[50] 361 U.S. 195.

[51] For reasons elucidated in Part II, we reject, however, the further contention of the Commission (Commission Br. 45–47) that "price" was the only issue on the remand.

[52] As we indicated earlier (note 8, supra), Superior was not a party to the refund warning order of January 10, 1962. In our view, the order has no significance one way or the other.

[53] *Montana-Dakota Util. Co.* v. *Northwestern Pub. Serv. Co.*, 1951, 341 U.S. 246, 71 S. Ct. 692, 95 L. Ed. 912; *Panhandle Eastern Pipe Line Co.* v. *FPC*, 3 Cir., 1956, 236 F. 2d 289, 292. The Supreme Court in *T.I.M.E.* v. *United States*, 1959, 359 U.S. 464, 469–70, 79 S. Ct. 904, 3 L. Ed. 2d 952, has recently said of *Montana-Dakota:* "It was held that the Federal Power Act, which like the Motor Carrier Act expressly declares unreasonable rates to be 'unlawful', does not create a cause of action for the recovery of allegedly unreasonable past rates * * *."

[647] order. Thus, under the unique circumstances of this case, refunds are proper.[54]

We have here an unusual situation. On the one hand we hold that producers cannot carry the general principle forbidding reparational orders to the point where it permits them to retain, without question, what was obtained under invalid orders. That means that refunds of excess collections are required. But there is no reason why the producers should, in point of time, be required to refund the difference between the amount collected and the conditioned price as soon as it is determined. Refund at that point is not required to serve any public purpose, or reimburse consumers for excess charges. It may, however, impose irreparable loss to the producers. One public interest is, of course, against triggering. But in these five to six years any triggering effect has already taken place, and its impact has been felt. This clock cannot be turned back. As to consumers, they are ultimately entitled to a refund only to the extent that payments made here exceeded a "just and reasonable" rate.

The problem then is to accommodate what we regard to be the inherent power of the Commission to prevent detriment to the consumers to the needs of this case. To balance the two it means that the refunds for collections made during this long period can be determined [648] only after the "just and reasonable" rate is fixed by an appropriate § 4 or § 5 proceeding.

Indeed, it is the operative impact of the policy against reparations, see note 53, *supra*, which makes this necessary. If the present refund order is affirmed, the producers must repay the difference between the conditioned price and the amount collected. In a § 4 or 5 rate hearing, it may well, however, turn out the "just and reasonable" rate is determined to be higher than the conditioned price.[55] But if the refunds have been made, that would be an empty ruling since there would

[54] In so holding we do not accept the Commission's argument that it has some general powers to protect public rights similar to that of the NLRB in reinstatement and back pay awards in unfair labor practice cases. The propriety of the refund here stands on the peculiar circumstances of this case.

[55] We agree with the Commission and the intervenor-distributors that in the § 7 proceedings here ordered, the inquiry on public convenience and necessity is not synonymous with determination of "just and reasonable" rate to be fixed under § 4 or § 5. This forces the conclusion that the conditioned price may well be different from the rate ultimately fixed.

be neither a legal right nor a practicable means for the producers to recapture that portion of the excessive refunds. *Atlantic Seaboard Corp.* v. *FPC*, 4 Cir., 1953, 201 F. 2d 568, 572; *Sohio Petroleum Co.* v. *FPC*, 10 Cir., 1961, 298 F. 2d 465, 467. The result, of course, would be that the consumers during the interim would have had gas at a rate less than "just and reasonable." No consumer is entitled under the statute to that. Nothing in the law should encourage that result or its possibility. And for it to occur means more than an undeserved windfall for favored customers. It means that other ratepayers are absorbing this deficiency and are therefore paying more than they should.

Such an approach is all the more required in view of the action which we take in remanding these cases [649] for yet further hearings. Finding, as we do, significant procedural defects, we cannot sustain the conditioned price of 18.5¢. What that price will be, or whether there will be a price condition, must await the outcome of the further hearings. Refunds at the present time would be premature. At the same time this imposes no impossible administrative burden.[56] When and as the Commission on further hearings fixes the conditions, it can prescribe the necessary security to assure that the refunds, when ultimately fixed, will be paid and to or through the proper parties.

We agree that refunds can be required.[57] But to meet the exigencies of this unique case, they must be based, not on the conditioned price when fixed, but on the difference between the

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[56] If, as the Commission contends, our ruling requires a § 7 hearing bordering on a § 4, 5 rate case, there is no reason why the Commission as to these particular cases does not consolidate with the remanded certification proceedings a § 4 or 5 rate case. Consolidation has been ordered before, see, e.g., *Texas Eastern Gas & Transmission Co.* v. *FPC*, 5 Cir., 1962, 306 F. 2d 345, 349, cert. denied, 1963, 375 U.S. 941, 84 S. Ct. 347, 11 L. Ed. 2d 273. Where these cases started out with 69 producer applicants, settlements have washed out all except these petitioners. As a precedent, our ruling is something less than the specter supposed, since the Commission, and many others including this Court, look with hope to the day when the area pricing procedure will supply most of the answers. *Hunt* v. *FPC*, 5 Cir., 1962, 306 F. 2d 334, 343; *Hill* v. *FPC*, 5 Cir., 1964, — F. 2d —, — [Nos. 20375, 20386, July 23, 1964]; *Wisconsin* v. *FPC*, 1963, 373 U.S. 294, 83 S. Ct. 1266, 10 L. Ed. 2d 357.

[57] We think it inappropriate at this time to express any views as to interest or the rate, if interest is to be allowed.

price collected and the rate found in a proper proceeding to be the "just and reasonable" one.[88]

[650]

V

The "In-Line" Price Established

The petitioners assert that in arriving at the in-line price of 18.5¢, the Commission improperly excluded many higher, finally certificated prices, failed to give proper weight to prices approved by the Commission's own settlements in similar cases, and failed generally to give proper evaluation to the evidence showing contract prices from which to infer the "in-line" price. This, and the petitioner's related contention, that the evidence demonstrated an in-line price not less than the contract price are matters on which we need not express any view. The remand for further hearing to receive all pertinent evidence, see Part II above, means that these aspects are likewise open for rehearing and redetermination.[89]

VI

Take-or-Pay Provisions

In accordance with its earlier decision in *Skelly*, 1962, 28 FPC 401,[90] the Commission ordered that the [651] take-or-pay provisions in the contracts should be subject prospectively to the Commission's future order in a pending rule-making proceeding, Docket No. R–199 with a provision that producers would not be required to file take-or-pay provisions for less the 80% of the annual contract quantities.

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[88] As to Frankel's petition [No. 21028] and Placid's contention as to sales from its well No. 1, Raceland Field, we need only say that, subject to the principles we have discussed as to refunds generally, we agree with the Commission that it is appropriate to require that these producers make whatever refunds are ultimately found to be due for collections made during the time of their respective operations.

As to Superior's petition, except for the Commission allowing a grace period up to August 10, 1959, for sales under one temporary certificate, not here challenged, though similar action was disapproved in *Public Service Co. of New York* v. *FPC*, D.C. Cir., 1964, 329 F. 2d 242, 250, there appears to be no substantial difference between this record and the others.

[89] It should be clear that all we say about the "price" itself is equally applicable to the tax reimbursement element.

[90] *Public Service Corp. of New York* v. *FPC*, D.C. Cir., 1964, 329 F. 2d 242.

Superior alone contends that for gas not delivered there is no sale, and therefore take-or-pay provisions are beyond the jurisdiction of the Commission under the exclusionary language of § 1(b), 15 USCA § 717(b). When viewed realistically in the light of the imperative necessity for long term gas supply commitments, we agree with the Commission that this arrangement constitutes a sale within its power of regulation.

Under the peculiarities of this case with service having long ago been commenced and with no suggestion on the part of anyone that they wish to terminate it, we agree with the D.C. Circuit in its holding that this phase of the order does not presently present a reviewable matter. *Public Service Corp. of New York* v. *FPC*, D.C. Cir., 1964, 329 F. 2d 242, 248; see also *Humble Oil & Refining Co.* v. *FPC*, 5 Cir., 1956, 236 F. 2d 819, cert. denied, 1957, 352 U.S. 967, 77 S. Ct. 354, 1 L. Ed. 2d 321.

The causes are therefore reversed and remanded to the Commission for other and further proceedings consistent with this opinion.

Reversed and remanded.

[652] In the United States Court of Appeals for the Fifth Circuit

No. 20872

CALLERY PROPERTIES, INC., PETITIONER

versus

FEDERAL POWER COMMISSION, RESPONDENT

No. 20885

THE SUPERIOR OIL COMPANY, PETITIONER

versus

FEDERAL POWER COMMISSION, RESPONDENT

No. 20890

CAROLINE HUNT SANDS AND LOYD B. SANDS, PETITIONERS

versus

FEDERAL POWER COMMISSION, RESPONDENT

No. 20891

PLACID OIL COMPANY, PETITIONER

versus

FEDERAL POWER COMMISSION, RESPONDENT

[653] No. 20892

MARGARET HUNT HILL, TRUSTEE FOR HASSIE HUNT TRUST, PETITIONER

versus

FEDERAL POWER COMMISSION, RESPONDENT

No. 20967

J. RAY MCDERMOTT & COMPANY, INC., PETITIONER

versus

FEDERAL POWER COMMISSION, RESPONDENT

No. 20989

OCEAN DRILLING & EXPLORATION COMPANY, PETITIONER

versus

FEDERAL POWER COMMISSION, RESPONDENT

No. 21028

J. R. FRANKEL, ET AL., PETITIONER

versus

FEDERAL POWER COMMISSION, RESPONDENT

[654] *On Petition to Review Orders of the Federal Power Commission*

Before RIVES and BROWN, Circuit Judges, and GROOMS, District Judge

Judgment—August 14, 1964

This cause came to be heard on the petitions of Callery Properties, Inc., The Superior Oil Company, Caroline Hunt Sands and Loyd B. Sands, Placid Oil Company, Margaret Hunt Hill,

Trustee for Hassie Hunt Trust, J. Ray McDermott & Co., Inc., Ocean Drilling & Exploration Company, and J. R. Frankel, Et Al., for review of Orders of the Federal Power Commission issued on July 17, 1963 and September 11, 1963, in Docket Nos. G–13183, et al., and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered, adjudged and decreed by this Court that the Orders of the Federal Power Commission in these causes be and the same are hereby reversed; and that these causes be, and they are hereby remanded to the Commission for other and further proceedings consistent with the opinion of this Court.

Issued as Mandate:

[655] [Clerk's certificate to foregoing transcript omitted in printing.]

[656] Supreme Court of the United States

October Term, 1964

No. ——

OCEAN DRILLING & EXPLORATION COMPANY, PETITIONER

vs.

FEDERAL POWER COMMISSION, ET AL.

Order extending time to file petition for writ of certiorari

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including November 23, 1964.

HUGO L. BLACK,
Associate Justice of the
Supreme Court of the United States.

Dated this 6th day of November 1964.

[657] Supreme Court of the United States

October Term, 1964

No. ——

FEDERAL POWER COMMISSION, PETITIONER

vs.

CALLERY PROPERTIES, INC., ET AL.

Order extending time to file petition for writ of certiorari

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including December 12, 1964.

HUGO L. BLACK,
Associate Justice of the Supreme Court of the United States.

Dated this 12th day of November 1964.

[658] Supreme Court of the United States

October Term, 1964

No. 671

THE UNITED GAS IMPROVEMENT COMPANY, ET AL., PETITIONERS

v.

CALLERY PROPERTIES, INC., ET AL.

Order allowing certiorari—March 8, 1965

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted. The case is consolidated with Nos. 678, 714, and 765 and a total of four hours is allotted for oral argument.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[659] Supreme Court of the United States

October Term, 1964

No. 678

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, PETITIONER

v.

CALLERY PROPERTIES, INC., ET AL.

Order allowing certiorari—March 8, 1965

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted. The case is consolidated with Nos. 671, 714, and 756 and a total of four hours is allotted for oral argument.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[660] Supreme Court of the United States

October Term, 1964

No. 714

OCEAN DRILLING & EXPLORATION COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION, ET AL.

Order allowing certiorari—March 8, 1965

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted. The case is consolidated with Nos. 671, 678, and 756 and a total of four hours is allotted for oral argument.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[661] Supreme Court of the United States

October Term, 1964

No. 756

FEDERAL POWER COMMISSION, PETITIONER

v.

CALLERY PROPERTIES, INC., ET AL.

Order allowing certiorari—March 8, 1965

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted. The case is consolidated with Nos. 671, 678, and 714 and a total of four hours is allotted for oral argument.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U.S. GOVERNMENT PRINTING OFFICE: 1965

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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1964.

No. [redacted] ,21

THE UNITED GAS IMPROVEMENT COMPANY, LONG ISLAND LIGHTING COMPANY, AND PHILADELPHIA ELECTRIC COMPANY,

Petitioners,

v.

CALLERY PROPERTIES, INC., J. R. FRANKEL, MARGARET HUNT HILL, TRUSTEE, J. RAY McDERMOTT & CO., INC., OCEAN DRILLING & EXPLORATION COMPANY, PLACID OIL CO., CAROLINE HUNT SANDS AND LOYD B. SANDS, AND THE SUPERIOR OIL COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1964.

No. .

THE UNITED GAS IMPROVEMENT COMPANY, LONG ISLAND LIGHTING COMPANY, AND PHILADELPHIA ELECTRIC COMPANY,

Petitioners,

v.

CALLERY PROPERTIES, INC., J. R. FRANKEL, MARGARET HUNT HILL, TRUSTEE, J. RAY McDERMOTT & CO., INC., OCEAN DRILLING & EXPLORATION COMPANY, PLACID OIL CO., CAROLINE HUNT SANDS AND LOYD B. SANDS, AND THE SUPERIOR OIL COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Petitioners, The United Gas Improvement Company, Long Island Lighting Company and Philadelphia Electric Company, pray that a Writ of Certiorari issue to review the judgment entered by the United States Court of Appeals for the Fifth Circuit on August 14, 1954, which reversed certain orders of the Federal Power Commission.

OPINIONS BELOW.

The opinion of the Court of Appeals for the Fifth Circuit is reported at 335 F. 2d 1004. It is reprinted as Appendix B hereto, *infra* pp. 11a-37a. The opinions of the Federal Power Commission are reported at 30 FPC 283 and 30 FPC 682 (1963), and are reprinted in the Joint Appendix filed in the Court of Appeals, copies of which have been deposited with this Court by the Solicitor General of the United States (R. 550-93, 607-17). The Examiner's decision, adopted in substantial part by the Commission, is reported at 30 FPC 304 (1963), and is also reprinted in the deposited Joint Appendix. (R. 491-541).

JURISDICTION.

The judgment of the Court of Appeals for the Fifth Circuit was entered on August 14, 1964, *infra* p. 40a. Jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1) and Section 19(b) of the Natural Gas Act, 15 U. S. C. § 717r(b).

QUESTIONS PRESENTED.

This Court held in *Atlantic Ref. Co. v. Public Service Comm'n.*, 360 U. S. 578 (*Catco*), that the Federal Power Commission erred on the record before it by issuing, under § 7 of the Natural Gas Act, unconditioned permanent certificates to independent producers of natural gas to make initial sales in interstate commerce from South Louisiana at the initial price of 22.4¢ per Mcf (including tax reimbursement). This Court there said that the producers' applications signalled the presence of a situation probably not in the public interest, and pointed out that such situations exist whenever an initial price—such as 22.4¢ per Mcf in South Louisiana—is "out of line" or "might result in a triggering of general price rises." When such a situation appears, this Court stated, the Commission must either deny the certificate altogether or attach such conditions as the public interest requires.

In the present case the Commission found as a fact that (1) prices during the relevant period in South Louisiana above 18.5¢ per Mcf (plus 1½ cents tax reimbursement) would be "out of line," and (2) any subsequent increase of the applicants' prices under § 4(e) above 23.55¢ per Mcf (including applicable tax) would trigger a general price rise in the area due to favored-nation or price redetermination clauses in other contracts. The Commission found no need to hear cost-of-service and other rate evidence, since (1) such evidence would have transformed the § 7 proceeding into a full-blown rate case, and (2) such evidence, in its expert judgment, gained from prior § 7 proceedings, was of no use in determining a proper initial price in conformity with this Court's *Catco* decision. Consequently, the Commission held it would issue permanent certificates to producer-respondents herein only upon the condition that they (1) reduce their initial prices to 18.5¢ per Mcf, plus tax; (2) not file for increases under § 4(e) of the Act above 23.55¢ per Mcf until July 1, 1967, or the

conclusion of the South Louisiana area rate proceeding, whichever was earlier; and (3) refund excesses collected pursuant to improperly issued certificates above 18.5¢ per Mcf, plus tax. The Court of Appeals reversed. It held the Commission erred in failing to listen to extensive cost and other rate case evidence, and in requiring a limited moratorium; it affirmed the Commission's power to order refunds, but found error in the Commission's standard for computing them. The questions presented, therefore, are:

1. In a proceeding to determine the initial price required by the public convenience and necessity under § 7, is the Commission required to receive all cost and trend evidence (including the type relevant to determine just and reasonable rates under § 4 or § 5 and concurrently being heard in the South Louisiana Area Rate Proceeding, Docket AR61-2), particularly where the Commission has determined in previous § 7 proceedings that such evidence is useless in determining the § 7 issues outlined by this Court in *Catco*?

2. Does § 7 permit the Commission to issue a permanent certificate upon the condition that the applicant sell at an initial price no higher than the "in line" price for the area?

3. Does § 7 permit the Commission to issue a permanent certificate upon the condition that an applicant not thereafter file for rate increases under § 4(e) above a level that would trigger a general price rise, until the Commission has time to complete the determination of just and reasonable rates for the area in an area rate proceeding being concurrently conducted?

4. Does § 7 permit the Commission to issue a permanent certificate upon the condition that an applicant refund all sums collected pursuant to improperly issued certificates above the proper public convenience and necessity initial price during the pendency of the determination of such price?

STATUTE INVOLVED.

The statutory provisions involved are §§ 4, 5, 7, and 19(b) of the Natural Gas Act, 52 Stat. 821 (1938), *as amended*, 15 U. S. C. §§ 717c, 717d, 717f and 717r(b). These Sections are printed in Appendix A, *infra*, pp. 1a-8a.

STATEMENT OF THE CASE.

As the Court of Appeals for the Fifth Circuit stated in its opinion below reversing the Federal Power Commission, these cases "present important questions under the Natural Gas Act, 15 USCA § 717. These include the nature of the hearing and the scope of the pertinent evidence bearing on price in a § 7 application for permanent certificate, the legality of retroactive rate refund, and the validity of a moratorium on post-certificate § 4 price increases" (Appendix B, *infra*, p. 11a).

The relevant facts are: Callery Properties, Inc. and the other 7 natural gas producer-respondents here entered into contracts with various interstate pipelines, including Transcontinental Gas Pipe Line Company, in 1957 and 1958 to sell gas from South Louisiana for resale by the pipelines in interstate commerce. The initial prices proposed ranged from 21.4¢ per Mcf (excluding tax reimbursement) to 23.8¢ per Mcf (including tax reimbursement). The contracts also provided for increased prices at periodic intervals, the increases ranging above 23.55¢ per Mcf. In a series of orders issued in 1958 and 1959, the Commission, over consumer opposition, granted unconditioned permanent certificates of public convenience and necessity authorizing such sales at the prices requested.[1] The producer-respondents accepted these certificates and began sales within a short time after their issuance even though the certificates were still subject to pending petitions for Commission rehearing and court review.

1. These various orders dealt with a total of 69 applications by various producers. After remand of these orders by the courts, the bulk of the applications were settled in accordance with terms approved by the Commission, 28 FPC 247 (1962).

The issuance of such unconditioned permanent certificates was contested by consumer representatives, including The United Gas Improvement Company and The Public Service Commission of New York, who maintained that the contract prices were excessive and that, therefore, the sales at the certificated prices would not be in the public interest. Consumer representatives sought judicial review of the Commission orders granting unconditional certificates in five United States Courts of Appeals. The Third Circuit sustained the Commission's action, *The United Gas Improvement Co. v. FPC*, 269 F. 2d 865 (3rd Cir. 1959), but this Court in December of 1959 summarily reversed that decision[2] and ordered the case remanded to the Commission for reconsideration and redetermination in the light of *Atlantic Refining Co. v. Public Service Comm'n*, 360 U. S. 378 (*Catco*). *Catco* stated that in a § 7 proceeding the Commission should not issue a permanent certificate permitting the sale of gas in interstate commerce where (1) the initial price was out of line, or (2) the contract price would cause triggering of general price rises in the area due to favored nation or price redetermination clauses in existing contracts with the same or other pipelines in the area.

After the summary reversal of the Third Circuit by this Court, the Ninth, District of Columbia, Tenth and Fifth (two cases) Circuits reversed similar Commission orders and remanded the proceedings to the Commission.[3]

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2. *Public Service Comm'n v. FPC*, 361 U. S. 195 (Texaco-Seaboard).

3. The original Commission opinions, and the court reversals are as follows (producer-respondents here shown in parentheses):

(1) *Transcontinental Gas Pipe Line Co.*, Op. 315, 20 FPC 264 (1958), *aff'd sub nom., United Gas Improvement Co. v. FPC*, 269 F. 2d 865 (3rd Cir. 1959) *reversed mem. sub nom., Public Service Comm'n v. FPC*, 361 U. S. 195 (Placid, Hill, Frankel).

(2) *Texas Gas Transmission Corp., Op.* 327, 22 FPC 378 (1959), *reversed, Public Service Comm'n v. FPC*, 287 F. 2d 146 (D. C. Cir. 1960), *cert. denied*, 365 U. S. 880 (Callery, Sands, McDermott, Ocean Drilling).

Finally, some four years after the original § 7 hearings, the Commission on March 7, 1962 set the remanded cases down for a new consolidated hearing, which was held on June 18-21, 1962.

The producers' evidence showed that

> ". . . there were 47 contracts executed in 1957 with volumes of 56,500 Mmcf and 59 contracts executed in 1958 with volumes of 70,500 Mmcf at initial prices of 18.5 cents or less. Also, out of a total of 1958 deliveries of 241,200 Mmcf from Southern Louisiana under contracts made prior to the initial erroneous CATCO order, only 63,900 Mmcf was sold at price above 18 cents." (R. 558)(footnote omitted)

The Examiner so found (R. 506-07) and the producers do not challenge the finding.

The Commission also noticed and found that if the producers were permitted to file for contractual increases above 23.55¢ per Mcf, rates of other producers in South Louisiana would be triggered upward (R. 577). This finding was not upset by the Court of Appeals. Appendix B, *infra*, p. 26a, n. 34.

The controversy here arises essentially because at the outset of the hearing the producer-respondents sought to offer in evidence a "tremendous mass of cost-type, economic and financial evidence—consisting of approximately 70 exhibits and the testimony of 35 witnesses" (R. 495; see Appendix B, *infra*, p. 14a).

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(3) *California Co.*, 22 FPC 252 (1959), *reversed, United Gas Improvement Co. v. FPC*, 283 F. 2d 817 (9th Cir. 1960), *cert. denied*, 365 U. S. 879 (Superior).

(4) *Sun Oil Co.*, 22 FPC 351 (1959), *reversed, United Gas Improvement Co. v. FPC*, 290 F. 2d 133 (5th Cir. 1961), *cert. denied*, 368 U. S. 823 (no present respondent).

(5) *Sunray Mid-Continent Oil Co.*, 22 FPC 361 (1959), *reversed, United Gas Improvement Co. v. FPC*, 287 F. 2d 159 (10th Cir. 1961) (no present respondent).

(6) *Superior Oil Co.*, 22 FPC 369 (1959), *reversed, United Gas Improvement Co. v. FPC*, 290 F. 2d 147 (5th Cir. 1961), *cert. denied*, 366 U. S. 964 (Superior).

In an important earlier cognate case, *Skelly Oil Co.*, Opinion No. 362, 28 F. P. C. 401 (1962), the Commission had considered evidence of the same type and concluded "in strong and unequivocal terms, that economic and financial evidence is generally not to be regarded as germane in resolving the initial price question in producer certificate cases" (R. 497). This decision of the Commission was affirmed by the Court of Appeals for the District of Columbia in *Public Service Comm'n v. FPC*, 329 F. 2d 242 (D. C. Cir. 1964), *cert. denied*, 377 U. S. 963.

In the present case the Commission adopted the Examiner's conclusion that the offered evidence:

> ". . . may be characterized roughly as falling generally into three basic categories, as follows:
>
> "1) *Cost of service studies* of various types. It may be noted that substantial portions of this evidence were defective in that they employed methods and techniques inconsistent with those previously adopted by the Commission in *Phillips*, Op. No. 338, and CATCO, Op. No. 351.
>
> "2) A number of *discounted cash flow studies*, similar to the one rejected by the Commission in CATCO, Op. No. 351.
>
> "3) *Economic trend data studies* of various types, setting forth data related to drilling trends and costs, data related to supply, demand, revenues and profits, and market trend data.
>
> "Certain of these studies were identical in nature with similar studies which the Commission in the El Paso certificate case, El Paso Natural Gas Co., et al., Op. No. 358 (June 11, 1962), found to have 'no real probative value.'" (R. 556, 495) (footnote omitted)

The Examiner refused to accept such evidence, and was sustained in this ruling by the Commission. The Commis-

sion rested its refusal to consider such evidence upon the following ground:

> "If this mountain of cost-type, economic and financial evidence had been received in the instant proceeding the instant hearing would, in effect, have amounted to the trial of some 16 different individual producer cost-type cases, and the decisional process required would have involved, in effect, the writing of some 16 different individual producer rate decisions. Any such proceeding would plainly have amounted to an administrative monstrosity. It would obviously have been completely contrary to the objectives emphasized in the Commission's instant order of March 7, 1962, i.e., to obtain a prompt determination of the initial price question (and of the refund obligations of the producer applicants), by a limited proceeding on the basis of the 'ground rules' already established by the Commission in CATCO, Op. No. 351. In addition, any such procedure would have been completely inconsistent with the Commission's clearly expressed policy determination that producers rates are hereafter to be tried and decided on an area basis, rather than on an individual producer cost basis." (R. 556, 496) (footnote omitted)

Having resolved the cost evidence issue, the Examiner proceeded to find that the going price for substantial sales volumes of gas under contemporarily executed contracts in South Louisiana was 18.5¢ per Mcf, plus 1.5¢ reimbursement for the state severance tax, where applicable. He conditioned permanent certificates to this level and ordered refunds, with interest, of all amounts theretofore collected under improperly issued certificates in excess of the in-line price so determined. On July 17, 1963, some five years after the original hearings, the Commission issued its Opinion 398 affirming the Examiner in all respects. In addition, the Commission, based upon its finding that any

price above 23.55¢ would trigger general price rises under other contracts in the area, ordered a limited moratorium on all price increases in excess of 23.55¢ per Mcf (including tax reimbursement) until the final decision of the area rate proceeding for South Louisiana, Docket AR61-2, which is to fix the just and reasonable price for gas in the area, or until July 1, 1967, whichever is earlier.

Callery Properties, Inc. and the seven other producer-respondents here, took an appeal to the Court of Appeals for the Fifth Circuit. The United Gas Improvement Company, Long Island Lighting Company and Philadelphia Electric Company,[4] Petitioners here, were permitted to intervene. That court on August 14, 1964, reversed the Commission. It held that the Commission erred in excluding the cost-type evidence. Despite the Commission's clear holding that such evidence would cause § 7 proceedings to bog down and become full dress § 4 or 5 rate hearings and, based upon experience in previous cases where such evidence was admitted, was not useful, in any event, in determining the public-convenience-and-necessity initial price in § 7 proceedings, the court below nevertheless held that such extensive evidence would have to be accepted. In so ruling, the court made no reference to the crucial fact that this Court had held, *Wisconsin v. FPC*, 373 U. S. 294, that the

4. Under an agreement with the City of Philadelphia, The United Gas Improvement Company operates the municipally-owned Philadelphia Gas Works and related facilities, distributing 1035 Btu natural gas to some 600,000 customers in the City of Philadelphia. It also distributes gas to some 205,000 customers in other parts of Pennsylvania. Long Island Lighting Company, a utility organized under the Transportation Corporation Law of the State of New York, distributes natural gas to some 357,000 customers in an area of 1,230 square miles on Long Island, New York. Philadelphia Electric Company is a public utility organized under the laws of the Commonwealth of Pennsylvania. It distributes natural gas to some 240,000 customers in Delaware, Chester, Montgomery, Bucks and Lancaster Counties, Pennsylvania. All three distributors purchase substantial quantities of natural gas for resale from Transcontinental Gas Pipe Line Company and other pipelines which in turn purchase substantial quantities of gas from producers in South Louisiana.

Commission need not proceed in *rate* cases on the basis of *individual company costs,* or the fact that other cost and trend evidence was at the time of decision being heard in a lengthy area rate proceeding (Docket AR61-2) involving the very area—South Louisiana— and covering the very producers in the present case. The court further held that the Commission had no power by condition to impose a limited moratorium on the producers' exercise of their contract right to file rate increases above 23.55¢ until July 1, 1967, or the conclusion of AR61-2 (in which Staff and intervenor evidence supports a just and reasonable rate well *below* the in-line level found by the Commission in the present proceeding). This holding overrode the Commission finding that any filing above 23.55¢ would trigger rate increases under other contracts. Finally, the court held that the Commission had the power to order refunds, but that the refunds could not be ordered down to the appropriate initial price level. Rather, it geared refunds to an as yet undertermined just and reasonable level, in the unlikely event that that level should turn out to be higher than the initial price level.

Petitioners now seek review of this decision by this Court. As pointed out *infra,* the decision by the Court of Appeals for the Fifth Circuit has caused great confusion in § 7 proceedings. Producers now contend that the decision compels the Commission in other § 7 proceedings to accept cost-of-service evidence wholesale and regardless, while consumers interests and the Commission have contended that such evidence is still useless, fatal to effective regulation and not required. The correctness of either contention depends upon whether the decision of the Court of Appeals for the District of Columbia in *Skelly,* cited above, is correct, or must bow to the antipodal decision of the court below.

REASONS FOR GRANTING THE WRIT.

1. The Fifth Circuit Decision on Exclusion of Cost-of-Service Evidence and Measure of Refunds Is in Direct Conflict With the Decision of the Court of Appeals for the District of Columbia and Applicable Decisions of This Court; The Fifth Circuit Decision on Limited Moratorium Is Contrary to the Provisions of the Natural Gas Act and Applicable Decisions of This Court.

Section 7 of the Natural Gas Act provides that it is illegal to sell gas in interstate commerce for resale without a permanent certificate[5] from the Commission. The section provides that such certificates are to be granted if and only if such sales are found by the Commission to comport with the public convenience and necessity. Reversing an unconditioned permanent certification there before it, this Court said in *Catco:*

> "Where the application on its face or on presentation of evidence signals the existence of a situation that probably would not be in the public interest, a permanent certificate should not be issued.
>
> "There is, of course, available in such a situation, a method by which the applicant and the Commission can arrive at a rate that is in keeping with the public convenience and necessity. The Congress, in § 7(e), has authorized the Commission to condition certificates in such manner as the public convenience and necessity may require. Where the proposed price is not in keeping with the public interest because it is out of line or because its approval might result in a triggering of

5. The statute and regulation provide for the issuance of temporary certificates in an emergency pending the final decision on the producer's application for a permanent certificate. See, *e.g., FPC v. Hunt,* 376 U. S. 515.

general price rises or an increase in the applicant's existing rates by reason of 'favored nation' clauses or otherwise, the Commission in the exercise of its discretion might attach such conditions as it believes necessary." 360 U. S. at 391.

In discharging its statutory responsibility, as clarified in *Catco*, the Commission, through experience in numerous § 7 proceedings, developed the rule that it would not issue permanent certificates if the initial price sought to be charged exceeded other prices which the evidence of record showed were being concurrently charged in the area in question. The producers, however, have sought since *Catco* to convert initial price hearings under § 7 into full-blown rate cases with all the necessarily attendant delays. Thus an attempt has been made to introduce individual company cost-of-service evidence and other types of evidence which would be introduced if the Commission was to determine whether a rate was just and reasonable, under §§ 4 and 5 of the Act. The Commission has recognized, however, that such evidence would require hearings as long and complex as the hearings which would be required to fix a just and reasonable rate. The Commission also determined, after examining some evidence of this sort in a number of earlier § 7 cases, that such evidence was not "germane in resolving the initial price question in producer certificate cases" (R. 497). Finally, in the *Skelly* case, the Commission concluded:

> "We therefore hold that cost of service and financial requirements evidence normally is not relevant in producer certificate cases and that the initial price in such proceedings shall be determined by the 'in line' price in the area at the time the producer contract in issue was executed and by our guideline ceiling price for the area. We do not mean to foreclose the possibility that a producer may present compelling circumstances in a particular proceeding to justify a higher price, but we wish to emphasize that with the guide-

lines herein established the price issue in certificate cases should be handled expeditiously and that before any evidence which would customarily be presented in establishing a just and reasonable rate can be admitted in evidence, a convincing showing must be made that such evidence is essential to the just disposition of the price question.

"Obviously, we cannot permit every individual certificate case to be converted into a full-blown rate case; the proof in this proceeding demonstrates the lack of utility of a limited cost of service presentation. . . . To correct those defects would require a complete rate case, which we have found not warranted in a certificate proceeding." 28 FPC at 411.

The Court of Appeals for the District of Columbia on January 23, 1964, affirmed the Commission, stating:

"Continental contends that the Commission erred in not considering certain costs and financial requirements, evidence with respect to which was presented to show the amount Continental would be required to receive to recoup its cash outlay with respect to one area of its production here involved, and in failing to consider evidence as to the industry's replacement costs of gas, submitted by Texaco and adopted by the other producers. However, these are not rate cases of the type in which evidence of this kind ordinarily is considered relevant. These proceedings under Section 7, considered with the Catco decision, permit the Commission to fix the 'in-line' price, not on a basis of cash outlay or replacement costs, but on the basis of the price level established by comparable sales contracted for by those placing gas in the area in interstate commerce. The standards of Sections 4 and 5 are not those to be used in conditioning a certificate issued under Section 7; otherwise the purpose of Catco to avoid the consequences of the well nigh interminable

proceedings incident to a rate case would be defeated. See, for example, United Gas Improvement Co. v. F. P. C., supra, 283 F. 2d at 823. Consideration of the proffered evidence was not essential." 329 F. 2d at 246. (footnote omitted)

The Fifth Circuit below, however, held in direct conflict that consideration of such evidence *was* essential.

The Commission has clearly recognized the conflict between the two Circuits. In its Opinion 436A in *Union Texas Petroleum, et al.*, Docket G-13221, et al., issued October 8, 1964, it said, at mimeo page 3:

> "We are now seeking review of this [*Callery*] decision which is in conflict with the views of other circuit courts as well as this Commission by certiorari to the United States Supreme Court (see *Public Service Commission of New York v. F. P. C.*, 329 F. 2d 242)."

Prior to the instant case all the decisions of the Courts of Appeals on the initial price question have permitted the Commission to base an appropriate initial price in a § 7 proceeding upon an examination of comparable area sales and not of cost or other rate case evidence. *Texaco, Inc. v. FPC*, 290 F. 2d 149 (5th Cir. 1961); *California Oil Co. v. FPC*, 315 F. 2d 652 (10th Cir. 1963); *Atlantic Refining Co. v. FPC*, 316 F. 2d 677 (D. C. Cir. 1963).

In *Phillips Petroleum*, 24 FPC 537 (1960), the Commission found that over-all regulation of producer rates under §§ 4 and 5 was impossible on the basis of individual company costs. This Court affirmed. *Wisconsin v. FPC*, 373 U. S. 294. Yet the court below held that just such individual company costs must be admitted in a hearing under § 7 of the Act. This could only result in a greater "administrative monstrosity" than that described to this Court by the Commission in *Wisconsin v. FPC, supra*, with interminable § 7 cases (oriented to individual company costs) piled on top of existing Sections 4 and 5 area rate

cases. The Natural Gas Act clearly does not contemplate such a procedure. The decision below, far from supporting the "complete bond of protection" for consumers which the Act was passed to effectuate, 360 U. S. at p. 388, heralds destruction of the bond through the sheer weight of administrative delay.

On the issue of a limited moratorium on contractual rate filings above 23.55¢ per Mcf it should be noted that the Commission found that if it were to certificate contracts which permit filings for rate increases above 23.55¢ per Mcf, it would create a situation where other rate filings above 23.55¢ would be triggered in the area due to favored nation or price redetermination clauses in other producer-pipeline contracts. The Court of Appeals for the Fifth Circuit, however, held that the Commission had no power to prevent such triggering. This holding is in direct conflict with this Court's decision in *Catco,* which held that the Commission had the power and, indeed, the obligation to condition the issuance of permanent certificate so as to avoid the effect of triggering. See 360 U. S. at 391. The decision moreover is in conflict with the rationale of this Court's recent decision in *FPC v. Hunt,* 376 U. S. 515, reversing a Fifth Circuit holding that § 7 did not permit the imposition of a moratorium. In that case this Court was dealing with a moratorium on filing for a rate increase as made a condition in a temporary certificate. But as the Fifth Circuit recognized below—yet failed to follow—the language of § 7 makes no distinction between a temporary and a permanent certificate (Appendix B, p. 27a). The rationale of this Court's decision in *Hunt* would apply with even greater force to the issuance of a permanent certificate.

The Fifth Circuit held that the Commission had the power to order refunds of amounts collected under erroneously issued certificates above the public interest initial price. This holding is in accord with the decision of the

Court of Appeals for the District of Columbia in *Skelly, supra,* 329 F. 2d at 249. However, the court below placed the limitation—not raised before the Commission or argued by any of the parties before the court—that refunds of such amounts could be made only down to a floor based upon a finding of the just and reasonable rate for the given sales. This limitation effectively vitiates the court's positive ruling on refunds and again calls for the type of further delays which are so serious in the area of refunds. This limitation imposed *sua sponte* by the court below is in direct conflict with the ruling of the Court of Appeals for the District of Columbia in *Skelly, supra,* 329 F. 2d at 250, that the Commission has power to order refunds of amounts collected pending permanent certification down to the initial price level where the equities permit. The court below disregarded the Commission's findings herein as to the equities (R. 561-62; 514-27), and substituted a procedure of its own devising, geared to a just and reasonable criterion. This procedure is contrary to that uniformly followed by the Commission when it has ordered refunds in cases like the present one, *e.g., Continental Oil Co.,* 27 FPC 96 (1962) (*Catco*-on-remand); *Socony Mobil Oil Co.,* 27 FPC 347 (1962); *cf. Shell Oil Co. v. FPC,* 334 F. 2d 1002, 1008 (3d Cir. 1964). The effect of the court's decision to make justness and reasonableness of rates a criterion in ordering refunds would inevitably be either to turn all certificate proceedings into rate hearings or to defer the ordering of refunds until the conclusion of subsequently instituted rate hearings. Either result would effectively lessen the bond of protection which refunds offer the consumer. *FPC v. Tennessee Gas Transmission Co.,* 371 U. S. 145, 154-55.

2. The Issues Presented Are of Great Public Importance in the Administration and Future Operation of the Natural Gas Act and if Not Resolved Will Cause Confusion in the Discharge of the Commission's Responsibility Under § 7 of the Act.

Since its decision in the *Skelly* case, *supra*, the Commission has determined that in a § 7 proceeding it will not permit the introduction of cost-of-service evidence; that where refunds are appropriate it would order refunds down to the initial price; and that it would impose a moratorium on filings above 23.55¢ per Mcf because of the triggering effect, until it had disposed of the Area Rate proceeding in South Louisiana, or July 1, 1967, whichever is earlier. This procedure was adopted to hold the line until the Commission can complete the Area Rate proceedings adopted as the technique to regulate producer prices. This Court has given tentative approval to such an approach. *Wisconsin v. FPC*, 373 U. S. 294. The decision of which review is here sought holds that in each one of its particulars the Commission's procedure was in error. Such a decision makes a shambles and a nullity of the Commission's painstakingly worked out regulatory program to hold the initial price line until completion of its area rate proceedings.

As this Court knows, review of a Commission order can always be taken to the District of Columbia Circuit. 15 U. S. C. § 717r(b). In addition, review can be had in any other Circuit in which one or more of the parties is located, *ibid.* Thus the Commission has no way of anticipating whether a given decision will be reviewed by the District of Columbia Circuit or another Circuit, such as the Fifth Circuit. The District of Columbia Circuit has told the Commission that its procedure is correct; the Fifth Circuit has told the Commission the opposite. In cases presently being heard before the Commission producers have attempted to introduce cost-of-service evi-

dence, relying upon the decision below, but the Commission has taken a firm position that until the conflict is resolved by this Court, it will continue to follow the practice approved by the contrary ruling of the District of Columbia Circuit, which this Court refused to review. 329 F. 2d 242, *cert. denied*, 377 U. S. 963.

There are now pending before the courts or in hearing before the Commission the following proceedings in which the issue of the introduction of cost-of-service evidence is in contest as the result of application of the Commission's procedure: *Amerada Petroleum, et al.*, Docket CI62-1544, *et al.* (Texas); *Union Texas Petroleum Corp., et al.*, Docket G-13221, *et al.* (So. La.); *Sun Oil Co., et al.*, Docket G-8592, *et al.* (Miss.); *H. L. Hawkins & H. L. Hawkins, Jr., et al.*, Docket G-18077, *et al.* (Texas); *Sinclair Oil & Gas Co., et al., Docket* G-16760, *et al.* (Texas); *Turnbull & Zoch Drilling Co., et al.*, Docket G-17960, *et al.* (Texas). In each case the Examiner has refused cost-of-service and similar evidence. Each case will have to be retried if appeal to the Fifth Circuit results in reversal. Such a reversal would entail holding individual "rate-type" proceedings for each and any of the some hundred and fifty producers involved in these various proceedings should they choose to introduce extensive cost evidence. In contrast, if appeal is to the District of Columbia Circuit, the Commission would be sustained on these issues. Such a situation necessarily creates confusion and chaos in the administrative process.

It is equally of public importance to determine the power of the Commission to require a moratorium pending the outcome of the area rate proceeding in South Louisiana. If the decision below stands, the Commission could find itself required to conduct hundreds of §§ 4(e) and 5(a) proceedings, resulting from triggered rate increases, simultaneously with the "rate-type" § 7 proceeding contemplated by the court's decision below and with the numerous area

rate proceedings now planned, four of which (dealing with the major gas areas) are in some stage of hearing.

Finally, it is in the public interest to determine the proper measure of the refunds since the Commission previously has uniformly followed the practice that refunds should be made down to the initial price ultimately found, rather than to a just and reasonable level.[6] If the floor is the just and reasonable price, it would mean once again that the Commission would necessarily find itself involved in lengthy § 4(e) and § 5(a) hearings to determine such price. The other alternative would be that the issue of the amount of refunds would have to remain in suspension until after the Area Rate proceedings are concluded, a procedure which substantially vitiates the protection they are supposed to offer the ultimate consumer. *FPC v. Tennessee Gas Transmission Co.*, 371 U. S. 154.

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6. In this connection it is significant to note that the evidence submitted both by the Commission's Staff and the Intervenors in the South Louisiana Area Rate proceeding, Docket AR61-2, indicates that the just and reasonable rate for sales comparable to those of respondents herein is well below the 20.0¢ per Mcf floor used by the Commission in the present case. Any difference of this kind will, of course, under the structure of the Act, be unrecoverable by consumers.

CONCLUSION.

For the reasons stated above this Court should issue its Writ of Certiorari to review the decision of the Fifth Circuit entered in *Callery Properties, Inc., et al. v. FPC* on August 14, 1964.

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Dated: November 10, 1964.

APPENDIX A.

RATES AND CHARGES; SCHEDULES; SUSPENSION OF NEW RATES.

SEC. 4. (a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this act takes effect) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulations, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, State commission, or gas distributing company or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the

filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

FIXING RATE AND CHARGES; DETERMINATION OF COST OF PRODUCTION OR TRANSPORTATION.

SEC. 5. (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however,* That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural-gas company on

file with the Commission, unless such increase is in accordance with a new schedule filed by such natural-gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

(b) The Commission upon its own motion, or upon the request of any State commission, whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transportation of natural gas by a natural-gas company in cases where the Commission has no authority to establish a rate governing the transportation or sale of such natural gas.

* * *

EXTENSION OF FACILITIES; ABANDONMENT OF SERVICE.

SEC. 7. (a) Whenever the Commission, after notice and opportunity for hearing, finds such action necessary or desirable in the public interest, it may by order direct a natural-gas company to extend or improve its transportation facilities, to establish physical connection of its transportation facilities with the facilities of, and sell natural gas to, any person or municipality engaged or legally authorized to engage in the local distribution of natural or artificial gas to the public, and for such purpose to extend its transportation facilities to communities immediately adjacent to such facilities or to territory served by such natural-gas company, if the Commission finds that no undue burden will be placed upon such natural-gas company thereby: *Provided*, That the Commission shall have no authority to compel the enlargement of transportation facilities for such purposes, or to compel such natural-gas company to establish physical connection or sell natural gas when to do so would impair its ability to render adequate service to its customers.

(b) No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment.

(c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however,* That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on the effective date of this amendatory Act, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after the effective date of this amendatory Act. Pending the determination of any such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall

be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest.

(d) Application for certificates shall be made in writing to the Commission, be verified under oath, and shall be in such form, contain such information, and notice thereof shall be served upon such interested parties and in such manner as the Commission shall, by regulation, require.

(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.

* * *

REHEARING: COURT REVIEW OF ORDERS.

Sec. 19 . . .

(b) Any party to a proceeding under this act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein the natural gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem

proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in [former] sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, sec. 1254).

APPENDIX B.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT.

No. 20872.

CALLERY PROPERTIES, INC.,
Petitioner,

v.

FEDERAL POWER COMMISSION,
Respondent.

No. 20885.

THE SUPERIOR OIL COMPANY,
Petitioner,

v.

FEDERAL POWER COMMISSION,
Respondent.

No. 20890.

CAROLINE HUNT SANDS AND LOYD B. SANDS,
Petitioners,

v.

FEDERAL POWER COMMISSION,
Respondent.

No. 20891.

PLACID OIL COMPANY,
Petitioner,

v.

FEDERAL POWER COMMISSION,
Respondent.

No. 20892.

MARGARET HUNT HILL, TRUSTEE FOR HASSIE HUNT TRUST,
Petitioner,

v.

FEDERAL POWER COMMISSION,
Respondent.

No. 20967.

J. RAY McDERMOTT & CO., INC.,
Petitioner,

v.

FEDERAL POWER COMMISSION,
Respondent.

No. 20989.

OCEAN DRILLING & EXPLORATION COMPANY,
Petitioner,

v.

FEDERAL POWER COMMISSION,
Respondent.

No. 21028.

J. R. FRANKEL, ET AL.,
Petitioners,

v.

FEDERAL POWER COMMISSION,
Respondent.

Petitions for Review of Orders of the Federal Power Commission.

(August 14, 1964.)

Before RIVES and BROWN, *Circuit Judges,* and GROOMS, *District Judge.*

BROWN, *Circuit Judge:* These cases present important questions under the Natural Gas Act, 15 USCA § 717. These include the nature of the hearing and the scope of the pertinent evidence bearing on price in a § 7 application for permanent certificate, the legality of retroactive rate refund, and the validity of a moratorium on post-certificate § 4 price increases.

The cases are not new for us, certainly not, as to one case. Their presence here bears out the prediction of the dissenter[1] that this case will be back several years and thousands of pages later."[2] Without assaying the balance

1. United Gas Improvement Co. v. FPC, 5 Cir., 1961, 290 F. 2d 133, 138, 147 (dissenting opinion).

2. The certificate of the records shows that some of these ran as high as 10,000 pages, others 5,000 and 6,000. Counsel, with the responsible concern demonstrated by Federal Power practitioners, public and private, have reduced it to 617 printed pages under our special FPC practice which became the forerunner of our amended Rules 23 and 24. See Hunt v. FPC, 5 Cir., 1962, 306 F. 2d 334, 336, n. 1. The 17 briefs exceed 480 additional pages.

of the dissenter's prophesy that "no one will know more than is known now," it is ironic that we hold that we do not know enough because the Commission declined to receive and evaluate important evidence. Thus, in their fifth year, these applications must now go back to have the kind of hearing which we, and other Courts of Appeals, directed.

I.

These are all fallout from Catco[3] in which the Supreme Court reversed the unconditioned certificate because the 21.4¢ price was "out of line."

Within a short time after affirmance by the Third Circuit on August 4, 1959, of the *Transco-Seaboard* case,[4] the FPC in 6 separate formal hearings involving a total of 69 producer applications issued unconditioned certificates for South Louisiana (and offshore) sales at initial contract prices ranging from 21.4¢ per Mcf where no tax reimbursement was due to 23.8¢ including tax reimbursement. But within 4 months, the Third Circuit's *Transco-Seaboard* decision was summarily reversed.[5] On appeals taken by various distributor-intervenors, the grant of the certificates was reversed by this Court and Courts of Appeals for the Third, Ninth, Tenth, and D. C. Circuits.[6]

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3. Atlantic Refining Company v. Public Service Commission of New York, 1959, 360 U. S. 378, 79 S. Ct. 1246, 3 L. Ed. 2d 1312.

4. United Gas Improvement Co. v. FPC, 3 Cir., 1959, 269 F. 2d 865.

5. Sub nom. Public Service Commission of New York v. FPC, December 14, 1959, 361 U. S. 195, 80 S. Ct. 292, 4 L. Ed. 2d 237.

6. The original Commission opinions, and the court reversals are as follows (present petitioners shown in parentheses):

(1) Transcontinental Gas Pipe Line Co., Op. 315, 1958, 20 FPC 264, aff'd sub nom. United Gas Improvement Co. v. FPC, 3 Cir., 1959, 269 F. 2d 865, reversed mem. sub nom. Public Service Comm'n of New York v. FPC, 1959, 361 U. S. 195, 80 S. Ct. 292, 4 L. Ed. 2d 237 (Placid in No. 20891, Hill in No. 20892, and Frankel in No. 21028).

(2) Texas Gas Transmission Corp., Op. 327, 1959, 22 FPC 378, reversed, Public Service Comm'n of New York v. FPC, D. C.

On May 10, 1961, the FPC consolidated the remanded proceedings with the Southern Louisiana area rate proceeding.[7] On January 10, 1963, the FPC denied motions of some intervenor-distributors for security on possible rate refunds. Expressing the view that it has "power to determine these proceedings on the basis of the respective records as originally made and in the light of additional facts of which we may take official notice" without further hearing, the Commission nevertheless determined to "adhere to the view that it would be fair and wiser in the present circumstances to offer the applicants a further opportunity to adduce evidence in docket numbers AR61-2 et al. In support of their proposed prices." But it ordered that rate collections "shall be subject to such refund provisions as

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Cir., 1960, 287 F. 2d 146, cert. denied, 1961, 365 U. S. 880, 882, 81 S. Ct. 1030, 1031, 6 L. Ed. 2d 192 (Callery in No. 20872, Sands in No. 20890, McDermott in No. 20967, and Ocean Drilling in No. 20989).

(3) California Co., 1959, 22 FPC 252, reversed, United Gas Improvement Co. v. FPC, 9 Cir., 1960, 283 F. 2d 817, cert. denied, 1961, 365 U. S. 879, 881, 81 S. Ct. 1030, 6 L. Ed. 2d 191, 192 (Superior in No. 20885).

(4) Sun Oil Co., 1959, 22 FPC 351, reversed, United Gas Improvement Co. v. FPC, 5 Cir., 1961, 290 F. 2d 133, cert. denied, 1961, 368 U. S. 823, 82 S. Ct. 41, 7 L. Ed. 2d 27.

(5) Sunray Mid-Continent Oil Co., 1959, 22 FPC 361, reversed, United Gas Improvement Co. v. FPC, 10 Cir., 1961, 287 F. 2d 159.

(6) Superior Oil Co., 1959, 22 FPC 369, reversed, United Gas Improvement Co. v. FPC, 5 Cir., 1961, 290 F. 2d 147, cert. denied, 1961, 366 U. S. 965, 81 S. Ct. 1926, 6 L. Ed. 2d 1255 (Superior in No. 20885).

7. Docket No. AR61-2, 26 Fed. Reg. 4296 (1961).

The area pricing was initiated by Statement of General Policy No. 61-1, issued September 28, 1960. 24 FPC 818 (1960); 18 C. F. R. § 2.56 (1961). By the First Amendment to Statement of General Policy No. 61-1, issued October 25, 1960, the FPC fixed an area price level of 21.5¢ per Mcf plus tax reimbursement. 25 Fed. Reg. 10,488 (1960). Subsequently, by the Fourth Amendment to Statement of General Policy No. 61-1, issued October 23, 1961, the FPC reduced the area price level for initial sales of gas from South Louisiana to 21.25¢ per Mcf, inclusive of tax reimbursement. 26 Fed. Reg. 10,342 (1961).

the Commission may lawfully prescribe by its final order * * * to the extent, if any, that the rate which has been collected exceeds the rate ultimately found to accord with the requirements of the public convenience and necessity."[8] In overruling the petitions for rehearing, the FPC on March 7, 1962, severed the proceedings from AR61-2 and then "consolidated [them] for the limited purpose of determining the public interest, initial price, or prices, applicable to these proceedings."[9] In this order of March 7, 1962, the FPC noted that six weeks earlier, in the remanded Catco dockets, it had found the in-line level in south Louisiana to be 18.5¢ per Mcf, plus 1.5¢ tax reimbursement where applicable. Rejecting contentions by intervenor-distributors that a like finding should peremptorily be entered in these proceedings, the Commission nonetheless concluded that it "should afford the producers further opportunity to be heard."

The hearings thus scheduled were held before an Examiner June 18-21, 1962. At the outset of the hearing, the producers sought to introduce what the Examiner described as "a tremendous mass of cost-type, economic and financial evidence." This cost-of-service evidence followed generally the pattern used by the Commission in prior determinations. Broadly speaking it demonstrated that on a cost-of-service basis the cost to the producers was considerably in excess of the contract price sought to be certificated in the pending applications. Other evidence bore upon the minimum financial requirements for finding and producing gas. These also used techniques and methods employed by the Commission in determining analogous minimum financial requirements. Other evidence showed the demand and sup-

8. Superior (our Case No. 20885—see Items (3), (6), note 6, supra, was not a party to this order.

9. Petitions to review the refund-warning order of January 10, 1962, were dismissed by us "without prejudice to the rights of petitioner to attack the validity of the orders * * * in petitions to review, * * * the orders of July 17, 1963, in the Commission's Opinion No. 398."

ply situation existing both nationwide and in South Louisiana. Some was detailed, indicating that the demand for gas is increasing far in excess of the annual additions of gas supply. Other evidence tied this directly into the exploration for, and finding of, new gas supplies to meet the increased demands, the relation of field prices to those efforts, the impact of lowered prices on exploratory activity, and the like. Other evidence showed the nationwide increase in the current cost of new gas supply over the pre-Catco prices, the increase in the weighted average contract price in this period in relation to drilling and exploratory costs, and refutation of the assertion that contract prices in South Louisiana have leaped from plateau to plateau. We need not describe it in any greater detail since in affirming the Examiner's rejection of the evidence, the Commission characterized it as "economic and financial evidence" including that relating to "an individual company or on an area-wide basis" without regard to whether it was "the type characterized as cost-of-service studies, cash flow studies, demand-supply, cost, profit and market price trends, area cost-revenue trends, comparative well cost data and gas replacement costs * * *."

On the motion of the intervenor-distributor supported by Commission staff, the Examiner rejected all of this evidence. In his decision of December 7, 1962, he (1) concluded that the in-line price for the pending sales was 18.5¢ per Mcf plus 1.5¢ per Mcf tax reimbursement where applicable, (2) directed that the producers refund, with interest, all amounts previously collected in excess of the in-line levels of 18.5¢ and 20.0¢.[10] Accepting in the main all of the Examiner's findings and conclusions, the FPC by opinion 398, issued July 17, 1963, took these actions. It unanimously sustained the exclusion of producer cost data, and the finding that the in-line price was 18.5¢. By a 4-1 vote it approved the

10. The Examiner rejected a number of contentions of Staff and intervenor distributors, one of the Staff being that "excess" payments made to the producers under "take-or-pay" provisions for gas not delivered should be refunded.

refunds.[11] In addition, the Commission—on the basis of a finding that rate filings to levels in excess of 23.55¢ per Mcf would cause widespread triggering throughout Southern Louisiana—imposed a moratorium on filings in excess of 23.55¢ until July 1, 1967, or until the conclusion of the pending Southern Louisiana AR61-2 proceeding, whichever is earlier.[12]

Petitions for review have been filed by the producers (see note 6, *supra*). The questions presented for our decision are these. (1) Did the Commission err in excluding the proffered cost and economic data evidence? (2) Did the Commission err in imposing a moratorium on price increases in a permanent certificate? (3) Did the Commission err in ordering refunds of the amounts previously collected? (4) Did the Commission err in fixing the in-line price at the 18.5¢ level? (5) Did the Commission err as to take-or-pay refund provisions? (6) Did the Commission err in making the refund order applicable to Frankel and Placid's Docket No. 13184?

II.

Exclusion of Cost Evidence.

We think that a proper consideration of the Act and its elucidation in Catco demonstrates that the Commission erred in rejecting the proffered evidence on cost and other economic data. No doubt Catco is significant and binding, and we accept it without any effort to whittle it down. But

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11. Refunds by Superior for collections under one temporary certificate prior to August 10, 1959, were excused based on the FPC's decision Skelly Oil Co. Op. 362, 1962, 28 FPC 401, subsequently reversed in Public Service Commission of New York v. FPC, D. C. Cir., 1964, 329 F. 2d 242.

12. The FPC rejected Staff's contentions of refund of take-or-pay prepayments, but it conditioned the certificates upon the ultimate outcome of a pending rule-making proceeding, R-199, review of which was recently held to be premature by the D. C. Cir., 1964, 329 F. 2d 242, 248.

the simple fact remains that it is a statute which we are expounding, and the statute does not refer to, much less speak of "in-line" price. To be sure, whether a proposed price is in-line or not is an important, sometime decisive, factor. But it is a factor to be weighed along with others in determining whether the proposed sale of gas in interstate commerce "is or will be required by the present or future public convenience and necessity." [13]

In the Commission Catco proceeding the Commission, presumably reasoning that a post-certification § 5 rate hearing would afford ample protection against improvident prices, declined altogether to consider the reasonableness of the proposed price or its relation to public convenience and necessity. This approach seemed to find some basis in the structure of the Act in which the statutory provisions concerning rates were found in §§ 4 [14] and

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13. Section 7(e), 52 Stat. 824, as amended, 56 Stat. 84, 15 USCA § 717f(e) provides:

"* * * [a] certificate shall be issued to any qualified applicant therefor authorizing the whole or any part of the operation, sale, service * * * covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of * * * the Act and the requirements, rules and regulations of the Commission thereunder, and that the proposed service, sale, operation * * * to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require."

14. 15 USCA § 717c.

"4(a) All rates and charges made, demanded, or received by any natural-gas company for * * * the transportation or sale of natural gas * * * shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

"* * *

"(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission * * * schedules showing all rates and charges for any transportation

5[15] and not in § 7 which dealt with the initial application for certification, temporary or permanent. This argument acquired some operational support from the magnitude of the administrative problems, both in time and manageability, of turning every § 7 application into a full blown rate hearing to determine whether the proposed rate was "just and reasonable."

The Supreme Court in Catco forcibly rejected this approach of the Commission. The Court made clear that price was indeed important. It recognized, of course, that "the Act does not require a determination of just and reasonable rates in a § 7 proceeding * * *" or "that a 'just and reasonable' rate hearing is a prerequisite to the issuance of producer certificates." And the Court pointed out that it was the delay in processing § 5 proceedings that "requires a most careful scrutiny and responsible reaction to initial price proposals of producers under § 7." But the Court immediately tied price to public convenience and necessity

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or sale * * * together with all contracts which in any manner affect or relate to such rates, charges, classifications and services.

"(d) Unless the Commission otherwise orders, no change shall be made * * * in any such rate * * * except after 30 days' notice to the Commission and to the public * * *.

"(e) Whenever any such new schedule is filed the Commission shall have authority * * * to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or esrvice; and, pending such hearing * * * may suspend the operation of such schedule * * * but not for a longer period than five months. * * * Where increased rates or charges are thus made effective, the Commission may * * * require the natural-gas company to furnish a bond * * * to refund, with interest, the portion of such increased rates or charges * * * found not justified. * * *."

15. 15 USCA § 717d.

"5(a) Whenever the Commission, after a hearing * * * shall find that any rate, charge * * * collected by any natural-gas company * * * is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge * * * practice or contract to be thereafter observed and enforced and shall fix the same by order: * * * ; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates."

by requiring that the price "proposal must be supported by evidence showing their necessity to 'the present or future public convenience and necessity' before permanent certificates are issued." The recent increase in the price levels, the Court went on, "does make price a consideration of prime importance" and "where the application on * * * presentation of evidence signals the existence of a situation that probably would not be in the public interest, a permanent certificate should not be issued." After stressing "public convenience and necessity" not less than six times in the space of two paragraphs, 360 U. S. 378, at 390-91, the Supreme Court for the first time articulates the "in-line" concept. "Where the proposed price is not in keeping with the public interest because it is out of line or because its approval might result in a triggering of general price rises or an increase in the applicant's existing rates by reason of 'favored nation' clauses or otherwise, the Commission in the exercise of its discretion might attach such conditions as it believes necessary." 360 U. S. 378, at 391.

The Court stressed that by certificate conditions under § 7, "the consuming public may be protected while the justness and reasonableness of the price fixed by the parties is being determined under other sections of the Act. Section 7 procedures in such situations thus act to hold the line awaiting adjudication of a just and reasonable rate." 360 U. S. 378, at 392. Of unusual importance here was the Court's statement in the analysis of the deficiencies of that record in which "no effort was made to give the 'reason why' * * * the proposed price was some 70% higher than the weighted average cost of 'existing gas to the purchaser.' "

As though Catco began and ended with "in-line" the Commission and the intervenor-distributors are mesmerized by this catch phrase into supposing that the Commission's responsibility is discharged with that limited inquiry and if unsatisfied on that score, it is free to reject out of hand a producer's application for a new service. Catco did

not so hold, and this approach ignores the plain terms of the statute which are no way diminished by Catco. Vast as is the discretion of the Commission, the statute, § 7(e), footnote 13, *supra*, accords positive rights to natural gas producers desiring to sell gas in interstate commerce. A producer does not, of course, have an absolute right to engage in the sale. It does, however, subject to compliance with reasonable procedural rules and requirements of the Commission [16] have an absolute right to a consideration of the application by the Commission and the right to have it granted "if it is found that the applicant is able and willing properly to do the acts and to perform the service * * * and the * * * sale * * * is or will be required by the * * * public convenience and necessity." The Commission does not, therefore, fulfill its statutory duty by the limited inquiry into whether the price is "in-line." Conversely, it has no power to deny the application solely on the ground that the price is not "in-line." To be sure, if the proposed price is not "in-line," this may become the dominant factor in denying the application. But it must be done as a part of the larger element of "public convenience and necessity." The Court makes this clear in *FPC v. Transcontinental Gas Pipe Line Corp.*, 1960, 365 U. S. 1, 8, 17, 22, 81 S. Ct. 435, 5 L. Ed. 2d 377: "In fact in interpreting this very section we said that 'Sec. 7(e) requires the Commission to evaluate all factors bearing on the public interest' * * *." Later, the Court states, "In this connection, it must be realized that the Commission's powers under Section 7 are, by definition limited. * * * The Commission cannot order a natural gas company to sell gas to users that it favors; it can only exercise a veto power over proposed transportation and it can only do this when a balance of all the circumstances weighs against certification." [17]

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16. FPC v. Texaco, Inc., 1964, — U. S. —, — S. Ct. —, 12 L. Ed. 2d 112.

17. Rejecting the Respondent's claim that the Commission had used its power to prevent a levering upward of field prices to bar direct sales of gas, it said: "Certainly such action would be contrary

In the concept of public convenience and necessity, price is, of course, very important. But it is not the whole thing. And certainly under a statutory scheme for a utility-type of regulation for the sale, not of a service, but of a depletable commodity,[18] where the Commission serves primarily as a rate-reviewing, not a rate-fixing agency,[19] and in which the entry into the regulated market is the voluntary act of the gas producer,[20] it is perfectly evident that many factors other than price alone bear upon public convenience and necessity and, in turn, upon price.

One of the most critical factors is, of course, the extent and nature of the demand. We decline to believe that the FPC can be oblivious to what all others know firsthand of occurrences since 1956-57, the era that begat the so-called Catco "in line" price. Population is increasing at explosive rates particularly in metropolitan areas in the South, Southwest and West Coast. What are, for example, the insatiable energy requirements of this ever-expanding population and industrial complex? If the demand is present,

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to our previous statements that the term 'public convenience and necessity, connotes a flexible balancing process, in the course of which all the factors are weighed prior to final determination. United States v. Detroit & Cleveland Navigation Co., supra.[19] * * * as the Commission stated, 'countervailing factors suffice to tip the balance against the grant of the authority requested by Transco.'"

Footnote 19 reads: "19. Compare the cases which have held that it was error for the Commission to refuse to consider certain factors within its power of notice. E.g., City of Pittsburg v. Federal Power Commission, 99 U. S. App. D. C. 113, 237 F. 2d 741."

18. Chief Judge Tuttle has pointed out: "This is concededly a difficult standard to specify especially in light of the fact that producers are in reality selling gas which they own and are not, in the traditional sense, primarily furnishing a service to the public." Gulf Oil Corp. v. FPC, 5 Cir., 1958, 255 F. 2d 556, 557.

19. United Gas Pipeline Co. v. Mobile Gas Service Corp., 1956, 350 U. S. 332, 76 S. Ct. 373, 100 L. Ed. 373.

20. FPC v. Hunt, 1964, — U. S. —, — S. Ct. —, 11 L. Ed. 2d 878, 883.

the next decisive question is, what about the supply? Can it reasonably be met by the gas now under dedication? Where and from what sources can the demand reasonably be satisfied? And whether this does, or does not, bring about price increases, the decisive question then becomes what price will it take to get the needed gas? The latter question, of course, sets in train a whole series of subsidiary inquiries. This is so because even under a system of voluntary initial dedication of gas, the acceptable price may not be measured by the intransigent demand of a producer. Inherent reasonableness in terms, say, of the likelihood that the needed supply of gas will be obtainable from others by exploration and new production and other similar questions would remain. Other factors could be named.[21] The important thing is that price is not the sole criteria.

A price-only approach does more than substitute for the statutory standard of "public convenience and necessity" a rigid, mechanical arithmetical guide. It is conceivable that such a test could imperil the public interest by foreclosing needed gas from the interstate market solely because the price is out of line. The so-called "in line" concept necessarily involves a question of time—here in the neighborhood of 1956-57 prior to the contaminating influence of the initial Catco contract. It involves also a selection of so-called comparables and a rejection of those which are either "too high," or are thought to be so, or are otherwise "suspect."[22] Essential as it is that the Commission scrutinize carefully apparent price increases, it is inconceivable

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21. Several factors were mentioned just this term in FPC v. Hunt, 1964, — U. S. —, — S. Ct. —, 11 L. Ed. 2d 878. The Court there concluded that the purpose as revealed by the legislative history was to give the FPC "an opportunity to scrutinize the financial setup, the adequacy of the gas reserves, the feasibility and adequacy of the proposed services, and the characteristics of the rate structure."

22. See Morris, Recent Independent Producer Certificate Cases: The "Suspect Order" Rule, 32 Geo. Wash. Law Rev. 489 (1964); Amerada Petroleum Corp., Op. No. 422, 1964, — FPC — [Nos. C162-1544, March 23, 1964].

that Congress meant to freeze the rates to 1956-1958,[23] or to any other particular time for that matter.[24]

Rather, the public interest is protected by requiring the Commission to consider price in terms of the whole public convenience and necessity. Indeed, this was recognized by the Ninth Circuit in one of the very cases precipitating the remands now under review.[25] That Court rejected as being "without merit" the "contention that the price line must necessarily accord with the pre-Catco line." The Court went on, "we agree with the view expressed by the Commission in Texas Gas Transmission Corp. et al., 22 FPC 378, 388, that factors such as increased production costs since CATCO, comparative accessibility of field locations and comparative depth of sands tend to make pre-CATCO prices irrelevant for comparative purposes in other cases." *United Gas Improvement Co. v. FPC*, 9 Cir., 1960, 283 F. 2d 817, 823. Earlier that Court stated that "* * * the Commission properly refers to circumstances under which an unconditional and permanent certificate might be issued notwithstanding the fact that the proposed price is out of line." 283 F. 2d 817, 821.

And this same theme was echoed by each of the other remanding Courts. "It is conceivable" said the Tenth

23. The 18.5¢ per Mcf price fixed here was the figure previously determined to be appropriate in the remanded Catco case, 1962, 27 FPC 96. This line was actually a 1956 level.

The Commission forecasts that the area proceedings will result in just and reasonable rates. But it recognizes that "[to hold the line] does not mean that irrespective of evidence to the contrary an absolute price freeze is to be imposed until some future date when area proceedings ultimately establish 'just and reasonable' rates."

In re Amerada Petroleum Corp., Op. 422, 1964, — FPC —, — [Docket No. C162-1544, March 23, 1964].

24. Indeed, the very nature of present and future public convenience and necessity forbids a look-back to 1956-57 only. The inquiry must include the time of the award. FCC v. Pottsville Broadcasting Co., 1940, 309 U. S. 134, 145, 60 S. Ct. 437, 84 L. Ed. 656; Easton Publishing Co. v. FCC, D. C. Cir., 1950, 185 F. 2d 987, 991.

25. See (3), note 6, supra.

Circuit, "that in some circumstances public convenience and necessity may require certificating of a sale when the price is 'out of line.'"[26] The D. C. Circuit pointed out alternative courses for the Commission where the "prices * * * are suspiciously higher." One course was to impose interim conditions. As to the other, it offered this solution. "On the other hand, it [the Commission] may grant unconditional certification upon evidence sufficient to 'support a finding of public convenience and necessity.'"[27] We spoke in terms of burden making "it * * * clearly incumbent on the proponent of [the proposed] rate to make some showing of the 'reason why' (as it was expressed in the Catco opinion) * * *," the proposed rate was a proper initial rate in view of rates half that high just a few years before.[28]

Evidence of the kind proffered by these petitioners bore upon these questions of public convenience and necessity. That the evidence would, in whole or in part, be pertinent to a § 4 or § 5 "just and reasonable" rate hearing is a matter of no decisive significance. If it proves too much, or proves too little, this is a matter calling for the expert evaluation and judgment of the Commission.[29] We

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26. United Gas Improvement Co. v. FPC, 10 Cir., 1961, 287 F. 2d 159, 163.

27. Public Service Commission v. Federal Power Commission, D. C. Cir., 1960, 287 F. 2d 146, 149. The Court then remanded as follows: "The order, insofar as it grants unconditional certification to the initial price proposals of the producer applicants, is reversed and the case is remanded to the Commission for further proceedings in which the producer applicants may, if they so choose, either augment the record so as to support a certification without price condition, or seek certification appropriately conditioned." 287 F. 2d 146, at 150.

28. United Gas Improvement Co. v. FPC, 5 Cir., 1961, 290 F. 2d 133, 138.

29. The argument that to receive evidence of this nature is to allow a producer a fair rate of return on excessive costs is a non sequitur. We agree with Judge Wright that "The Commission is not required to subsidize high cost producers with consumers' money." Atlantic Refining Co. v. FPC, D. C. Cir., 1963, 316 F. 2d 677, 680. But whether costs are "too high" or even "high" are comparative factual matters calling for evidence and evaluation.

have no fear that with resourceful ingenuity the Commission can develop procedural devices which will keep these § 7 hearings from being bogged down into the full dress § 4 or § 5 rate hearing. Its awesome task calls for great administrative inventiveness which will assure to all, producer, consumer, and public alike, the full measure of statutory rights. *Hill v. FPC*, 5 Cir., 1964, — F. 2d —, —, n. 27 [Nos. 20375, 20386, July 23, 1964].[30]

The task facing the Commission in this developing field calls for innovation and adaptation. It is not, therefore, enough merely to inquire whether the price is "in-line." On the other hand, for § 7 purposes, there need not be a full dress § 4 or § 5 rate hearing. The Commission must, however, hear and evaluate all relevant evidence bearing on

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30. Following the Supreme Court's lead in its admonition that the Commission must find ways to expedite proceedings, we there pointed out that much delay flows from an overuse of motions to dismiss instead of an evaluation of evidence for its intrinsic worth in the light of the Commission's expertise. The instant cases graphically illustrate that a motion to strike evidence relating to complex activities is an equally awkward procedural device of limited utility. For all we know, had the Commission received the proffered evidence, it would have held it to be wanting, and that might well have been the end of the matter. Now the case must go back and proceed through lengthy hearings, rehearings, exceptions, arguments before the Commission, rehearings and reargument to receive and evaluate this very evidence. In terms of time and the public interest, the apparent time-saving device of striking this evidence as irrelevant has proved again that the shortest way through is often the longest way around. Determining the utter and irretrievable irrelevance of a large body of evidence under the nuances of a concept as elusive as public convenience and necessity is indeed a summary procedure. And we have many times pointed out that summary procedures "present a treacherous record for deciding issues of far-flung import, on which * * * [Courts] should draw inferences with caution from complicated courses of legislation * * * and practice." Kennedy v. Silas Mason Co., 1948, 334 U. S. 249, 257, 68 S. Ct. 1031, 92 L. Ed. 1347; Chapman v. Hawthorne Flying Service, 5 Cir., 1961, 287 F. 2d 539, 541.

public convenience and necessity when it is urged, or held,[31] that the proposed price is out of line.[32]

III.
Price Moratorium.

So far as rates are concerned, the Commission did two principal things. First it conditioned the permanent certificate on a reduction of the initial rate to 18.5¢ per Mcf. Second, it found that there was a triggering[33] at 23.55¢, and in order to prevent retriggering, it prohibited the producers from exercising their contract rights to file rate increases above 23.55¢ until the conclusion of AR61-2 or July 1, 1967, whichever is earlier. That moratorium does permit, however, increases from 18.5¢ up to 23.55¢.[34]

Although the Supreme Court stated that the "extent of [the] power [to condition price changes] in permanent certification is not before us now," we think the full import of its recent decision, reversing this Court, *Federal Power Commission v. Hunt*, 1964, — U. S. —, 84 S. Ct. —, 11 L. Ed. 2d 858, 886, compels a holding that the Natural Gas

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31. Nothing will keep the Commission from doing this by a two-step proceeding. See Hill v. FPC, supra. Indeed, this Court has recently approved separate trial by separate juries of validity-infringement on the one hand and damages on the other in patent cases. Swofford v. B. & W., Inc., 5 Cir., 1964, — F. 2d — [No. 21024, July 28, 1964].

32. The evidence relating to cash outflow and replacement cost proffered and rejected in Public Service Commission of New York v. FPC, D. C. Cir., 1964, 329 F. 2d 242, was much more limited than that here. Nor do we regard California Oil Co. v. FPC, 10 Cir., 1963, 315 F. 2d 652 (inquiry as to what the line was); Atlantic Refining Co. v. FPC, D. C. Cir., 1963, 316 F. 2d 677 (question of in-lineness stipulated to be sole issue), as holding contrary to our decision.

33. Some of the proffered but rejected evidence, see Part II, supra, actually touched on the factual basis, or lack thereof, of the Catco assumption that "new price plateaus will * * * be created." 360 U. S. 378, at 390. We assume, however, that there was a factual basis for the Commission's finding.

34. The moratorium has a present impact. See, e.g., Superior's contract with United permitting escalation to 23.5¢ plus 2.3¢ tax reimbursement.

Act forbids a moratorium on price increases as a condition to the issuance of a permanent certificate.

Of course the statute gives the Commission the power to attach "such reasonable terms and conditions" to the issuance of the certificate "as the public convenience and necessity may require." See footnote 13, *supra*. Literally, no distinction is made between temporary and permanent certificates. And undoubtedly there are a number of conditions which lawfully may be attached to the issuance of a permanent certificate.[35] But as the Court did there, when we examine the interplay between § 7 on certification and §§ 4 and 5 on "just and reasonable" rates and rate changes, we think that Congress did not intend that the Commission have the power by a certificate condition to supersede the working of § 4. By § 4 Congress established a statutory scheme in which rates are prescribed and become effective by contractual provision. *United Gas Pipeline Co. v. Mobile Gas Service Corp.*, 1956, 350 U. S. 332, 76 S. Ct. 373, 100 L. Ed. 373; *United Gas Pipeline Co. v. Memphis Light, Gas & Water Division*, 1958, 358 U. S. 103, 79 S. Ct. 194, 3 L. Ed. 2d 153.

There is no real question about the operative process or effect of § 4(e). Subject only to suspension for a limited brief period of time and the obligation to refund on final determination, the rates prescribed in the contract become effective when filed. The only real problem is the point at which the rights of a producer and the powers of the Commission under § 4 become applicable. This the Court answers squarely in *Hunt*. "Under the procedures of the Act, it is at the point of permanent or unconditional temporary certification that the provisions of § 4 become applicable." — U. S. —, — S. Ct. —, 11 L. Ed. 2d 878, at 884. It is at that point that "the gas has been permanently certificated into interstate commerce * * *" and, the Court continues, at that point "the independent producer is then free to pursue the rate filing procedure of that section."

35. — U. S. —, — S. Ct. —, 11 L. Ed. 2d 878, 885, n. 3.

Other parts of the opinion make clear that the critical distinction is between the temporary, conditional certificate, on the one hand, and a permanent certificate on the other. Thus the Court points out, "once a permanent certificate is granted, the Commission can correct an improper rate only under § 5 of the Act * * *," — U. S. —, 11 L. Ed. 2d 878, 883. In view of the necessity for some character of certificate before the gas "can move into interstate commerce" and the statutory right to apply "for temporary authorization" the Court recognizes that "* * * the Commission must have the authority to condition a temporary certificate so as to avoid irreparable injury to affected parties." But, the Court goes on, this "* * * condition, once imposed, continues only during the pendency of the producer's application for a permanent certificate." — U. S. —, 11 L. Ed. 2d 878, 884. And some of the more sweeping statements made in Catco [36] where reference was made to conditional certificates without indication as to permanent or temporary must now be read as conditional *temporary* certificates. For the Court, immediately preceding an extensive quotation from Catco, put its own characterization on the nature of the certificates being dealt with in Catco when it said, "this Court previously discussed the use of the *temporary* certificate procedure in" Catco. (Emphasis supplied.) — U. S. —, 11 L. Ed. 2d 878, 884.

The correctness of our holding is demonstrated by the peculiar facts of this record. For applications filed in 1958,[37] the Commission asserts the power to compel the producer to sell gas for nearly ten years [38] at a price sub-

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36. 360 U. S. 378, 79 S. Ct. 1246, 3 L. Ed. 2d 1312.

37. The Placid and McDermott applications, filed September and December 1958, are typical. There were some as early as April 1957.

38. The moratorium runs until July 1, 1967, or until any earlier final decision in AR61-2. AR61-2 is still going strong. Its earlier counterpart, the Permian Basin hearing, AR61-1, is pending for decision before the Examiner. The briefs inform us that Chairman Swidler has stated that it will be March of 1965 before 61-1 is decided by the Examiner and the end of 1965 before 61-2 is forthcoming. Oil

stantially less than the opening contract price and without the opportunity of being able to ever seek and obtain the automatic stepped up price increases provided for in the contract. Thus, for nearly half of the twenty-year contract period [39] through the guise of a "price" condition, the Commission obtains an irrevocable dedication [40] of the gas to interstate sale and an effectual denial of any opportunity for the producer to exercise the legislative right to file, subject to suspension and refund, contractual rate increases. If the Commission may do it for half of the period, there is no reason why it may not do so for all. Congress could hardly have intended to delegate the power of legislative repeal by any such easy route.

Actually, the Commission's argument for moratorium power harkens back to the like contention made to support exclusion of pertinent economic data discussed in Part II above. Here, as there, it insists that it must have the power to impose a price moratorium because the alternative is either to force a full blown § 4 or § 5 "just and reasonable" rate hearing, which is an unmanageable administrative problem, or exclude the needed gas from the market until such time as such a hearing can be conducted. But as there, we fail to see that it is a case of either or. If the kind of hearing which the particular facts of a particular application require [41] for determination of "public

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& Gas Journal 62 (March 16, 1964). A minimum of two years more will be required before they grind through Commission review to land in some Court of Appeals for judicial review. See Wisconsin v. FPC, 1963, 373 U. S. 294, 83 S. Ct. 1266, 10 L. Ed. 2d 357; FPC v. Texaco, 1964, — U. S. —, 84 S. Ct. —, 12 L. Ed. 2d 112, 119, n. 13.

39. Superior's contract with United covering Bayou Penchant and other leases in Terrebonne Parish and the November 1, 1957, contract between Hassie Hunt Trust and Transco appear to be typical.

40. Since all petitioners have made sales, none is free to withdraw its reserves from dedication. J. M. Huber Corp. v. FPC, 3 Cir., 1956, 236 F. 2d 550.

41. There are no hard and fast rules. Adaptation is the order of the day in this undulating field. See Hill v. FPC, 5 Cir., 1964, — F. 2d — [Nos. 20375, 20386, July 23, 1964].

convenience and necessity," it is to be assumed that the Commission will issue a permanent certificate only if the initial contract price is in line or, if out of line, meets the statutory standard of public convenience and necessity. Full protection to the consumer is thereafter accorded so far as subsequent contract rate increases are concerned under the suspension and refund procedures of § 4(e). If, in that situation, there might be some further triggering impact, then that would flow from the unique statutory scheme which Congress, not the Commission nor the Courts, are free to change no matter how unsound some might think it to be.

The Commission's brief recognizes that it "is true that in *CATCO, Texaco, Inc. v. FPC* * * *, *Atlantic Refining Co. v. FPC* and *California Oil Co. v. FPC* cited by [certain of the petitioners] the Courts assumed that any rate increases contractually permitted could be filed under Section 4 at any time after operations were commenced under a certificate."[42] But it treats these as judicial aberrations resulting presumably from a failure on the part of the Commission "to meet its hold-the-line obligation by a moratorium condition." This leads the Commission's counsel to claim the necessity for, and the existence of, a power to take whatever action, impose whatever conditions to assure that "excessively high prices are absolutely prevented from being charged." But no matter how commendable that policy may be, the Commission may not supersede § 4 to accomplish it.

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42. Commission Br. 39. The cases referred to are: Catco, 360 U. S. 378; Texaco, Inc. v. FPC, 5 Cir., 1961, 290 F. 2d 149, 156; Atlantic Refining Co. v. FPC, D. C. Cir., 1963, 316 F. 2d 677; California Oil Co. v. FPC, 10 Cir., 1963, 315 F. 2d 652, 660; see also Willmut Gas & Oil Co. v. FPC, D. C. Cir., 1961, 294 F. 2d 245.

IV.
Retroactive Refunds.

After fixing the initial price at 18.5¢ per Mcf, the Commission in its conditions also required that the producers refund, with interest, the excess over that figure which had been collected under the judicially reversed unconditioned certificates.

The producers make three principal attacks on this refund order. The first one—that the intervenor-distributors should have sought to stay gas deliveries pending determination in the respective Courts of Appeals [43] of their petitions for review—has little merit. Quite apart from any problem of whether intervenor-distributors could have met applicable standards for a stay,[44] the producers' plight was not brought about by the failure of the petitioning intervenors to obtain a stay, but came from the action of the producers in making the deliveries under certificates which, though final, were then under direct judicial attack and subject as any competent Power Commission counsel would know, to the possibility of judicial reversal. The risk inherent in making deliveries pending final judicial determination was obvious to the producers. It was up to them to seek interim protective relief from the Commission, and there is no indication that extensions of time or other appropriate relief would have been declined by the Commission.

In the second attack some petitioners [45] apparently contend that the Commission could not order refunds be-

43. See note 6, supra.

44. The intervenors stress, for example, Virginia Petroleum Jobbers Association v. FPC, D. C. Cir., 1958, 259 F. 2d 921; Eastern Airlines, Inc. v. CAB, 2 Cir., 1958, 261 F. 2d 830; Airport Commission of Forsyth County v. CAB, 4 Cir., 1961, 296 F. 2d 95, 96; Associated Securities Corp. v. SEC, 10 Cir., 1960, 283 F. 2d 773, 774-75; and Armour & Co. v. Freeman, D. C. Cir., 1962, 304 F. 2d 404, 406-08, 418.

45. See, e.g., No. 20989 (Ocean Drilling), No. 20872 (Callery), and No. 20891 (Placid).

cause the original unconditioned certificates were not "vacated" or "set aside" by the Courts. Other petitioners urge the opposite—no refund right because certificates were "vacated." The wording of the remand orders vary, those of the Ninth Circuit,[46] Tenth Circuit,[47] and this Circuit[48] spoke in terms of "vacating" or "setting aside," whereas those in the D. C. Circuit[49] and the Third Circuit, following the Supreme Court's mandate,[50] spoke in terms of being remanded for further proceedings. But we agree with the Commission that by the choice of one rather than the other terminology, the remanding Courts intended no distinctive difference in effect.[51]

The third, and serious, attack made by all is that the operative effect of the refund is that of a reparation order.[52] Under the structure of the Act, it has long been recognized, and never questioned, that "* * * under the Act the Commission has no power to make reparation orders. And its power to fix rates admittedly is limited to those 'to be thereafter observed and in force.' " *FPC v. Hope Natural Gas Co.*, 1944, 320 U. S. 591, 618, 64 S. Ct. 281, 88 L. Ed. 333.[53]

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46. 283 F. 2d 817, at 826.

47. 287 F. 2d 159, at 163.

48. 290 F. 2d 133, at 138; 290 F. 2d 147, at 149.

49. 287 F. 2d 146, at 150.

50. 361 U. S. 195.

51. For reasons elucidated in Part II, we reject, however, the further contention of the Commission (Commission Br. 45-47) that "price" was the only issue on the remand.

52. As we indicated earlier (note 8, supra), Superior was not a party to the refund warning order of January 10, 1962. In our view, the order has no significance one way or the other.

53. Montana-Dakota Util. Co. v. Northwestern Pub. Serv. Co., 1951, 341 U. S. 246, 71 S. Ct. 692, 95 L. Ed. 912; Panhandle Eastern PipeLine Co. v. FPC, 3 Cir., 1956, 236 F. 2d 289, 292. The Supreme Court in T. I. M. E. v. United States, 1959, 359 U. S. 464, 469-70, 79 S. Ct. 904, 3 L. Ed. 2d 952, has recently said of *Montana-Dakota:* "It was held that the Federal Power Act, which like the Motor Carrier Act expressly declares unreasonable rates to be "un-

Although, as we point out shortly, these principles call for a special adaptation in the refund order, we think that the petitioners ignore the unusual circumstances of this case. By the remand orders (note 6, *supra*), all of the Courts of Appeals held that the unconditioned permanent certificates were improperly issued. It is one thing for a Court to rule that under a valid certificate the Commission lacks the power to retrospectively review rates and impose retroactive refund orders. It is quite another for a Court to conclude that a Commission lacking the power to do the former may yet not have inherent power to recapture the fruits obtained under an invalid, that is illegal, order. Thus, under the unique circumstances of this case, refunds are proper.[54]

We have here an unusual situation. On the one hand we hold that producers cannot carry the general principle forbidding reparational orders to the point where it permits them to retain, without question, what was obtained under invalid orders. That means that refunds of excess collections are required. But there is no reason why the producers should, in point of time, be required to refund the difference between the amount collected and the conditioned price as soon as it is determined. Refund at that point is not required to serve any public purpose, or reimburse consumers for excess charges. It may, however, impose irreparable loss to the producers. One public interest is, of course, against triggering. But in these five to six years any triggering effect has already taken place, and its impact has been felt. This clock cannot be turned back. As to consumers, they are ultimately entitled to a

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lawful', does not create a cause of action for the recovery of allegedly unreasonable past rates * * *."

54. In so holding we do not accept the Commission's argument that it has some general powers to protect public rights similar to that of the NLRB in reinstatement and back pay awards in unfair labor practice cases. The propriety of the refund here stands on the peculiar circumstances of this case.

refund only to the extent that payments made here exceeded a "just and reasonable" rate.

The problem then is to accommodate what we regard to be the inherent power of the Commission to prevent detriment to the consumers to the needs of this case. To balance the two it means that the refunds for collections made during this long period can be determined only after the "just and reasonable" rate is fixed by an appropriate § 4 or § 5 proceeding.

Indeed, it is the operative impact of the policy against reparations, see note 53, *supra,* which makes this necessary. If the present refund order is affirmed, the producers must repay the difference between the conditioned price and the amount collected. In a § 4 or 5 rate hearing, it may well, however, turn out the "just and reasonable" rate is determined to be higher than the conditioned price.[55] But if the refunds have been made, that would be an empty ruling since there would be neither a legal right nor a practicable means for the producers to recapture that portion of the excessive refunds. *Atlantic Seaboard Corp. v. FPC,* 4 Cir., 1953, 201 F. 2d 568, 572; *Sohio Petroleum Co. v. FPC,* 10 Cir., 1961, 298 F. 2d 465, 467. The result, of course, would be that the consumers during the interim would have had gas at a rate less than "just and reasonable." No consumer is entitled under the statute to that. Nothing in the law should encourage that result or its possibility. And for it to occur means more than an undeserved windfall for favored customers. It means that other rate-payers are absorbing this deficiency and are therefore paying more than they should.

Such an approach is all the more required in view of the action which we take in remanding these cases for yet

55. We agree with the Commission and the intervenor-distributors that in the § 7 proceedings here ordered, the inquiry on public convenience and necessity is not synonymous with determination of "just and reasonable" rate to be fixed under § 4 or § 5. This forces the conclusion that the conditioned price may well be different from the rate ultimately fixed.

further hearings. Finding, as we do, significant procedural defects, we cannot sustain the conditioned price of 18.5¢. What that price will be, or whether there will be a price condition, must await the outcome of the further hearings. Refunds at the present time would be premature. At the same time this imposes no impossible administrative burden.[56] When and as the Commission on further hearings fixes the conditions, it can prescribe the necessary security to assure that the refunds, when ultimately fixed, will be paid and to or through the proper parties.

We agree that refunds can be required.[57] But to meet the exigencies of this unique case, they must be based, not on the conditioned price when fixed, but on the difference between the price collected and the rate found in a proper proceeding to be the "just and reasonable" one.[58]

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56. If, as the Commission contends, our ruling requires a § 7 hearing bordering on a § 4, 5 rate case, there is no reason why the Commission as to these particular cases does not consolidate with the remanded certification proceedings a § 4 or 5 rate case. Consolidation has been ordered before, see, e.g., Texas Eastern Gas & Transmission Co. v. FPC, 5 Cir., 1962, 306 F. 2d 345, 349, cert. denied, 1963, 375 U. S. 941, 84 S. Ct. 347, 11 L. Ed. 2d 273. Where these cases started out with 69 producer applicants, settlements have washed out all except these petitioners. As a precedent, our ruling is something less than the specter supposed, since the Commission, and many others including this Court, look with hope to the day when the area pricing procedure will supply most of the answers. Hunt v. FPC, 5 Cir., 1962, 306 F. 2d 334, 343; Hill v. FPC, 5 Cir., 1964, — F. 2d —, — [Nos. 20375, 20386, July 23, 1964]; Wisconsin v. FPC, 1963, 373 U. S. 294, 83 S. Ct. 1266, 10 L. Ed. 2d 357.

57. We think it inappropriate at this time to express any views as to interest or the rate, if interest is to be allowed.

58. As to Frankel's petition [No. 21028] and Placid's contention as to sales from its well No. 1, Raceland Field, we need only say that, subject to the principles we have discussed as to refunds generally, we agree with the Commission that it is appropriate to require that these producers make whatever refunds are ultimately found to be due for collections made during the time of their respective operations.

As to Superior's petition, except for the Commission allowing a grace period up to August 10, 1959, for sales under one temporary certificate, not here challenged, though similar action was disapproved in Public Service Co. of New York v. FPC, D. C. Cir., 1964, 329 F. 2d 242, 250, there appears to be no substantial difference between this record and the others.

V.

The "In-Line" Price Established.

The petitioners assert that in arriving at the in-line price of 18.5¢, the Commission improperly excluded many higher, finally certificated prices, failed to give proper weight to prices approved by the Commission's own settlements in similar cases, and failed generally to give proper evaluation to the evidence showing contract prices from which to infer the "in-line" price. This, and the petitioner's related contention, that the evidence demonstrated an in-line price not less than the contract price are matters on which we need not express any view. The remand for further hearing to receive all pertinent evidence, see Part II above, means that these aspects are likewise open for rehearing and redetermination.[59]

V.

Take-or-Pay Provisions.

In accordance with its earlier decision in Skelly, 1962, 28 FPC 401,[60] the Commission ordered that the take-or-pay provisions in the contracts should be subject prospectively to the Commission's future order in a pending rule-making proceeding, Docket No. R-199 with a provision that producers would not be required to file take-or-pay provisions for less than 80% of the annual contract quantities.

Superior alone contends that for gas not delivered there is no sale, and therefore take-or-pay provisions are beyond the jurisdiction of the Commission under the exclusionary language of § 1(b), 15 USCA § 717(b). When viewed realistically in the light of the imperative necessity for long term gas supply commitments, we agree with the

59. It should be clear that all we say about the "price" itself is equally applicable to the tax reimbursement element.

60. Public Serevice Corp. of New York v. FPC, D. C. Cir., 1964, 329 F. 2d 242.

Commission that this arrangement constitutes a sale within its power of regulation.

Under the peculiarities of this case with service having long ago been commenced and with no suggestion on the part of anyone that they wish to terminate it, we agree with the D. C. Circuit in its holding that this phase of the order does not presently present a reviewable matter. *Public Service Corp. of New York v. FPC,* D. C. Cir., 1964, 329 F. 2d 242, 248; see also *Humble Oil & Refining Co. v. FPC,* 5 Cir., 1956, 236 F. 2d 819, cert. denied, 1957, 352 U. S. 967, 77 S. Ct. 354, 1 L. Ed. 2d 321.

The causes are therefore reversed and remanded to the Commission for other and further proceedings consistent with this opinion.

REVERSED AND REMANDED.

APPENDIX C.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT.

No. 20872

CALLERY PROPERTIES, INC.,
Petitioner,

v.

FEDERAL POWER COMMISSION,
Respondent.

No. 20885

THE SUPERIOR OIL COMPANY,
Petitioner,

v.

FEDERAL POWER COMMISSION,
Respondent.

No. 20890

CAROLINE HUNT SANDS AND LOYD B. SANDS,
Petitioners,

v.

FEDERAL POWER COMMISSION,
Respondent.

No. 20891

PLACID OIL COMPANY,
Petitioner,

v.

FEDERAL POWER COMMISSION,
Respondent.

No. 20892

MARGARET HUNT HILL, TRUSTEE FOR HASSIE HUNT TRUST,
Petitioner,

v.

FEDERAL POWER COMMISSION,
Respondent.

No. 20967

J. RAY McDERMOTT & COMPANY, INC.,
Petitioner,

v.

FEDERAL POWER COMMISSION,
Respondent.

No. 20989

OCEAN DRILLING & EXPLORATION COMPANY,
Petitioner,

v.

FEDERAL POWER COMMISSION,
Respondent.

No. 21028

J. R. FRANKEL, ET AL.,
Petitioner,

v.

FEDERAL POWER COMMISSION,
Respondent.

ON PETITION TO REVIEW ORDERS OF THE FEDERAL POWER COMMISSION.

Before RIVES and BROWN, *Circuit Judges,* and GROOMS, *District Judge.*

Judgment.

This cause came to be heard on the petitions of Callery Properties, Inc., The Superior Oil Company, Caroline Hunt Sands and Loyd B. Sands, Placid Oil Company, Margaret Hunt Hill, Trustee for Hassie Hunt Trust, J. Ray McDermott & Co., Inc., Ocean Drilling & Exploration Company, and J. R. Frankel, et al., for review of Orders of the Federal Power Commission issued on July 17, 1963 and September 11, 1963, in Docket Nos. G-13183, et al., and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered, adjudged and decreed by this Court that the Orders of the Federal Power Commission in these causes be and the same are hereby reversed; and that these causes be, and they are hereby remanded to the Commission for other and further proceedings consistent with the opinion of this Court.

August 14, 1964

Issued as Mandate:

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No. [redacted] 22

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, *Petitioner,*

v.

CALLERY PROPERTIES, INC.; THE SUPERIOR OIL COMPANY; CAROLINE HUNT SANDS and LOYD B. SANDS; PLACID OIL COMPANY; MARGARET HUNT HILL, Trustee for Hassie Hunt Trust; J. RAY McDERMOTT & CO., INC.; OCEAN DRILLING & EXPLORATION COMPANY; J. R. FRANKEL, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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The Public Service Commission of the State of New York prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered on August 14, 1964.

OPINIONS BELOW

The opinion of the court of appeals (Appendix A, *infra*, pp. 1a-29a) is reported at 335 F.2d 1004. The opinion and order of the Federal Power Commission (R. 549-93) is reported at 30 FPC 283.

JURISDICTION

The judgment of the court of appeals setting aside the Commission's order was entered on August 14, 1964 (Appendix B, *infra*, p. 30a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. § 717r(b).

QUESTIONS PRESENTED

1. In passing upon producer certificate applications under Section 7 of the Natural Gas Act, is the Federal Power Commission required, prior to the imposition of a price-reducing condition, to receive cost and other evidence of the type normally considered in a rate hearing under Sections 4 and 5 of the Act where (a) receipt of such evidence would, by converting the certificate hearing into a rate hearing, make it impossible to process certificate applications, (b) the evidence thus received would be duplicative of evidence being received in the rate proceedings currently pending before the Commission, and (c) Commission imposition of a price-reducing condition in the certificate in no way bars the producer from subsequently filing for and collecting his initial contract price pending the outcome of the rate proceeding?

2. Where, following judicial reversal of its earlier unconditional certifications of high-priced producer sales, the Federal Power Commission on remand de-

termines that the initial price should have been conditioned to a lower, "in-line" level, does the Commission have power to require the producers to refund amounts in excess of the "in-line" level previously collected under the judicially invalidated certificates?

3. In issuing certificates of public convenience and necessity under Section 7 of the Natural Gas Act, does the Federal Power Commission have power to impose a condition barring for a limited period of time (during which it is anticipated that the just and reasonable area rate will be determined) future rate increase filings to levels which, because of their price-triggering effect on other contracts, will have a disruptive influence on gas costs and an adverse effect on the ultimate consumer?

STATUTE INVOLVED

The pertinent provisions of the Natural Gas Act, 52 Stat. 821, as amended, 15 U.S.C. §§ 717-717w, are set out in Appendix C, *infra*, pp. 31a-34a.

STATEMENT

The twelve contracts involved in this appeal—together with fifty-seven similar contracts originally consolidated therewith—were entered into in 1957 and 1958, in the period between the Federal Power Commission's unconditional certification of the then-unprecedented 21.4¢ per Mcf initial price in the famous *Catco* case, 17 FPC 880 (1957), and this Court's reversal of the Commission's action in *Atlantic Refining Co.* v. *Public Service Commission of New York*, 360 U.S. 378 (1959). On their key substantive points—area of production and price—these contracts were in the Catco mold, calling for sales from Southern Louis-

iana fields at initial prices of 21.5¢ per Mcf plus reimbursement (of 1.5¢ to 2.3¢ per Mcf) for Louisiana production taxes. Procedurally, too, the applications for certificates based on these contracts went the Catco route: after being grouped into six consolidated proceedings, the applications were, in 1958 and 1959, unconditionally certificated by the FPC, over the objections of petitioner and others as to the proposed prices, and, on appeals taken by petitioner and others, the certifications were set aside by this Court and by the courts of appeals for the District of Columbia, Fifth, Ninth, and Tenth Circuits.[1]

Proceedings on Remand—In January 1962, following extended hearings on the price issue in the remanded *Catco* case, the Commission ruled that the appropriate price for Southern Louisiana was not the 21.4¢ per Mcf sought by the Catco producers, but was, rather, 18.5¢ per Mcf (plus 1.5¢ tax reimbursement where applicable). Accordingly, the Commission issued new certificates limiting the initial price to 18.5¢ per Mcf and requiring full refunds of all excess amounts previously collected under the invalid certificates. *Continental Oil Co.*, Op. 351, 27 FPC 96.

Six weeks later, on March 7, 1962, the Federal Power Commission consolidated the sixty-nine dockets remanded as the result of the post-*Catco* appeals for the further proceedings which led to the instant appeal.[2]

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[1] The relevant citations to the FPC's unconditional certifications and the subsequent judicial reversals are set out at footnote 6 of the decision below, *infra*, p. 4a.

[2] Five related dockets—not involved in the earlier appeals—were also included in the order. Of the seventy-four dockets thus consolidated, sixty-one were settled prior to the Commission's decision herein. The producers in the remaining thirteen dockets all petitioned for review in the Fifth Circuit, but one of the petitions was subsequently withdrawn.

In that order, 27 FPC 482 (R. 410), the Commission conceded that there was merit to the position being urged by petitioner and others—the successful appellants in the earlier appeals—that the remanded proceedings should be disposed of, without further delay, on the basis of the revised Catco determination; it decided, however, that it "should afford the producers further opportunity to be heard," and accordingly set the consolidated proceeding for hearing.

At the o[illegible]et of that hearing, held June 18-21, 1962, the producers sought to introduce what the examiner described as "a tremendous mass of cost-type, economic and financial evidence" (R. 495). On motion of certain of the intervenors, supported by the Commission staff, the examiner ruled that such evidence was inadmissible. Evidence on the level of prices in Southern Louisiana during the period 1954-1962, however, was admitted by the examiner and was cross-examined.

The Commission's Determination—On December 7, 1962 the examiner issued his decision (R. 490-540) in which he concluded that the in-line price for the contracts here involved was 18.5¢ per Mcf plus 1.5¢ tax reimbursement where applicable, and he directed that the producers refund with interest all amounts previously collected in excess of the in-line levels of 18.5¢ and 20¢. Accepting, in the main, all of the examiner's findings and conclusions, the FPC, by decision issued July 9, 1963, (1) unanimously sustained the examiner's exclusion of cost data, (2) unanimously sustained the examiner's finding that the in-line level for the contracts here involved was the 18.5¢-plus-tax figure previously determined to be appropriate in the remanded *Catco* proceeding, 27 FPC 96 (1962), and (3) with one

Commissioner dissenting, ordered the producers to refund amounts in excess of 18.5¢-plus-tax previously collected under the judicially invalidated certificates. In addition, on the basis of its finding that rate filings to levels in excess of 23.55¢ per Mcf would cause widespread price triggering throughout Southern Louisiana, the Commission imposed a moratorium on filings in excess of 23.55¢ until July 1, 1967 or until the conclusion of the pending Southern Louisiana area rate proceeding, AR61-2, whichever is earlier.

Decision of the Court Below—On August 14, 1964, the Court of Appeals for the Fifth Circuit reversed the Commission on each of the principal issues in the case. Although stating that this Court's *Catco* decision, *Atlantic Refining Co.* v. *Public Service Commission of New York*, 360 U.S. 378 (1959), was "no doubt . . . significant and binding, and we accept it without any effort to whittle it down," the court below sharply criticized the Commission's application of the "in-line" concept articulated in *Catco*, concluding that the Commission "has no power to deny the [certificate] application solely on the ground that the price is not 'in-line.'" Before the Commission may deny or condition a certificate application based on an out-of-line price, the court held, it must consider all factors bearing upon public convenience and necessity. One of the most critical factors, according to the court, was the nature of the demand for natural gas—"the insatiable energy requirements" resulting from the fact that "population is increasing at explosive rates"—and "the decisive question then becomes what price will it take to get the needed gas?" Accordingly, concluded the court, the Commission committed reversible error in refusing to receive evidence of supply and demand.

Similarly, the court held that the cost-of-service data (of a type that would be relevant in a rate proceeding under Section 4 or 5 of the Act) proffered by the applicants on remand was relevant *as a matter of law* in determining public convenience and necessity. While twice conceding that the Commission is not required under Section 7 to enter into a "full dress § 4 or § 5 rate hearing," the court suggested that, through "resourceful ingenuity", the Commission could, in a Section 7 proceeding, conduct in effect an investigation into the just and reasonable rate without actually holding a rate hearing.

With respect to the Commission's imposition of a partial moratorium on rate increase filings, the court held, as it had in reversing a Commission-imposed moratorium in a temporary certificate in *Hunt* v. *F.P.C.*, 306 F.2d 334 (1962), that, however desirable the goal, imposition of a moratorium constituted an improper attempt by the Commission to supersede Section 4. The court below distinguished the subsequent reversal of its *Hunt* opinion by this Court, *F.P.C.* v. *Hunt*, 376 U.S. 515 (1964), on the ground that the later opinion makes a critical distinction between temporary and permanent certificates; the court below concluded, in fact, that *Hunt* now requires that "the more sweeping statements made in Catco where reference was made to conditional certificates without indication as to permanent or temporary must now be read as conditional *temporary* certificates" (emphasis in original).[8]

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[8] The conclusion of the court below is remarkable in that the *Catco* case involved only permanent certificates, not temporary certificates. See note 6, *infra* p. 18.

Turning to the refund issue, the court below agreed that the producers were not entitled "to retain . . . what was obtained under invalid orders." In the court's view, however, this provided "no reason why the producers should be required . . . to refund the difference between the amount collected and the conditioned price as soon as it is determined"; rather it would permit the producers to retain the excess revenues pending determination of the just and reasonable rate. The court found this procedure necessary in order to prevent the consumer from obtaining "an undeserved windfall", which, according to the court, would occur should it ultimately be determined that during the period that the excess rates were collected the just and reasonable rate was higher than the in-line price. "Nothing in the law," says the court below, "should encourage that result or its possibility."

REASONS FOR GRANTING THE WRIT

I. EXCLUSION OF RATE CASE EVIDENCE

A. Impact of Decision Below

By its insistence that rate-case type evidence is relevant to, and hence as a matter of law must be admitted in, a producer certificate proceeding, the decision of the court below not only sets aside a program of producer certificate regulation developed by the Federal Power Commission in direct response to this Court's *Catco* decision; not only sets aside a program which is fair and equitable and workable; not only sets aside a program which has been approved by other courts of appeals; but—and this is perhaps the most disastrous aspect of the decision—it leaves the Commission without any hope of developing a feasible alternative program. For it is perfectly clear that if the Commission

in a certificate proceeding is required to receive and evaluate cost-of-service studies for each producer applicant, together with evidence, presumably on both a regional and nation-wide basis, of supply and demand, then, notwithstanding the lower court's disclaimer, every certificate case will be turned into a full-blown rate case—taking several years and many thousands of pages of transcript to try. Since in fact it is administratively impossible to try producer certificate applications—and there are approximately 1200 such applications filed each year—under the criteria established by the decision below, the Commission would be faced with two alternatives: (1) it could decline to certificate any new sale in interstate commerce pending the outcome of its various area rate proceedings, or (2) it could permit the introduction of gas into interstate commerce under emergency temporary certificates (the emergency being its inability to hold the type of certificate hearing required by the court below) at prices which might be excessive and which might or might not be subject to refund upon permanent certification many years hence when the various area rate proceedings have been concluded. Neither alternative provides this nation's gas consumers with the type of protection that this Court, in *Catco,* held they were entitled to, and each alternative could have very dire public consequences.

B. Error of Decision Below

Pursuant to the standards set out in this Court's landmark *Catco* decision—*Atlantic Refining Co.* v. *Public Service Commission of New York,* 360 U.S. 378 at 391-92 (1959)—the Federal Power Commission between 1960 and 1962 evolved a new program for handl-

ing the thorny problem of determining the conditions under which producers should be issued certificates of public convenience and necessity to undertake new sales of natural gas for resale in interstate commerce.

Consistent with the position it had taken from the beginning of producer regulation (and which has been accepted by all parties and all reviewing courts dealing with the initial-price problem) that it was administratively impossible to hold a *rate* hearing, to determine the just and reasonable rate for the proposed sale, as part of each *certificate* hearing, the Commission accepted this Court's suggestion in *Catco* and began to use its conditioning power under Section 7 "to hold the line awaiting adjudication of a just and reasonable rate" under Sections 4 and 5. Under the *Catco* rationale, as the Commission learned from its experience in handling post-*Catco* proceedings, rate-case type evidence—i.e., individual-company or industry-wide cost and financial data, trends in supply and demand and their impact on the need for "incentive" allowances—though obviously relevant to a determination of the just and reasonable rate, had no relevance in a certificate proceeding. Moreover, since (1) admission of the rate-case data—together with the related cross-examination and rebuttal evidence—would make each certificate proceeding as "nigh interminable" as the rate proceedings had been, and (2) admission of the rate-case data in the certificate proceedings would make the certificate proceedings duplicative of the area rate proceedings, instituted for each major producing area, the Commission held, in *Skelly Oil Co.*, Op. 362, 28 FPC 401 (1962), that cost-of-service and financial-requirements evidence is not relevant in producer cer-

tificate cases.[4] As the Commission subsequently advised Congress, "This precedent-setting opinion has served to simplify independent producer initial service cases and has enabled the Commission to try these applications expeditiously." *Forty-Third Annual Report of the Federal Power Commission, 1963*, p. 13.

Subsequent to its *Skelly* opinion, the Commission and its examiners consistently excluded cost data from producer certificate cases, and the promise of expeditious treatment held out by *Skelly* was realized: the backlog of producer certificate applications was sharply whittled down through a series of consolidated proceedings, in which the hearings concluded in a week or two, with the hearing transcript seldom as high as 1500 pages.[5] And, in a later development of the *Skelly* case itself, the Court of Appeals for the District of Columbia Circuit, rejecting producer contentions, sustained the Commission's refusal to consider cost and financial data in certificate cases, *Public Service Comsion of New York* v. *F.P.C.*, 329 F.2d 242 at 246-47 (1964), cert. denied sub nom. *Prado Oil & Gas Co.* v. *F.P.C.*, 377 U.S. 963, stating:

> "[T]hese are not rate cases of the type in which evidence of this kind ordinarily is considered rele-

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[4] These conclusions were not reached in a vacuum, but were the fruit of bitter experience; thus the Commission noted, 28 FPC at 411, that where—as in the remanded *Catco* hearings—cost and financial data had been presented, rebutted, and cross-examined, and detailed findings made, the proceedings had been "complicated [and] long-drawn-out" and the results were "of limited utility."

[5] This contrasts with producer rate cases, where the hearings last from one to three years or even longer, and the hearing transcript frequently runs upward of 20,000 pages.

> vant. These proceedings under Section 7, considered with the *Catco* decision, permit the Commission to fix the 'in-line' price, not on a basis of cash outlay or replacement costs, but on the basis of the price level established by comparable sales contracted for by those placing gas in the area in interstate commerce. The standards of Sections 4 and 5 are not those to be used in conditioning a certificate issued under Section 7; otherwise the purpose of *Catco* to avoid the consequences of the well nigh interminable proceedings incident to a rate case would be defeated."

The D.C. Circuit's action in sustaining the Commission's *Skelly* opinion was foreshadowed not only by this Court's *Catco* decision but, even more explicitly, by the opinions of the courts of appeals in *Texaco Inc.* v. *F.P.C.*, 290 F.2d 149 (5th Cir. 1961), *California Oil Co.* v. *F.P.C.*, 315 F.2d 652 (10th Cir. 1963), and *Atlantic Refining Co.* v. *F.P.C.*, 316 F.2d 677 (D.C. Cir. 1963).

Thus, in *Texaco*, the Fifth Circuit, in an opinion written by Chief Judge Tuttle, held that the Commission could impose a price condition of 17.7 cents

> "not because it had determined in a Section 4(e) proceeding that 17.7 cents was a just and reasonable rate, but because it has the duty of certificating only such sales as are compatible with the public convenience and necessity." 290 F.2d at 155.

Developing this thought further, the court observed that

> "a section 7 proceeding is not to be equated with a proceeding under section 4 or section 5 to determine a just and reasonable rate. The power and duty of the Commission to give 'most careful scrutiny and reasonable reaction to initial price

proposals of producers' may be discharged by it without the elaborate and detailed proofs required in a section 4 or section 5 proceeding." 290 F.2d at 157.

Judge Tuttle's language was quoted with approval in *California Oil Co.* v. *F.P.C.*, 315 F.2d 652 at 659 (1963), where the Tenth Circuit sustained imposition of a 15.4¢ price condition. That court noted, 315 F.2d at 655:

> "At the outset, we must recognize and emphasize that this case involves the issuance of a certificate of public convenience and necessity under Section 7(e) of the Act. It is not a 'rate' case under either Section 4 or Section 5 and, therefore, the complex and intricate problems as to what is a 'just and reasonable' price under those sections are not before us. We have only to determine the issue of the validity of the price condition imposed upon the certificate issued to petitioner."

The court added, 315 F.2d at 657,

> "The Commission's power to condition a certificate is co-extensive with its power to reject or deny a certificate, even though this might make it impossible for the producer ever to get its initial price."

Writing for the D.C. Circuit in *Atlantic Refining Co.* v. *F.P.C.*, 316 F.2d 677 at 680 (1963), Judge J. Skelly Wright rejected a producer contention that, in imposing a price condition in a certificate case, the FPC is required to consider the individual producer's financial position and costs of production:

> "[T]he Commission is not required to subsidize high cost producers with consumers' money. More-

> over, because of the difficulties inherent in determining what costs of production of natural gas actually are, the Commission should be allowed some latitude in fixing initial prices on an area basis in order that hearings under Section 7 will not become as interminable as Section 5 hearings have been."

Thus, the basic conflict between the decision below and this Court's *Catco* decision—which, *inter alia,* held (1) that the Commission should deny or condition a certificate application where the proposed price is out of line or may cause triggering, 360 U.S. at 391, and (2) that the Commission can impose a rate condition designed to hold the line without conducting an investigation into the just and reasonable rate, 360 U.S. at 390-91, 392—is underscored by the square conflict between the decision below and these four court of appeals decisions—*Skelly, Texaco, California Oil,* and *Atlantic Refining*—in which the *Catco* holdings were followed.

One final point should be noted before leaving the exclusion-of-evidence issue. By excluding cost and financial data in the certificate proceeding, the Commission is not determining that such evidence is irrelevant in any and all proceedings involving the proposed sale; rather it is holding only that such evidence should be presented in the concurrent area rate proceeding. The question thus is not one of determining *whether* the evidence shall be received, but rather one of determining the proper forum for its receipt. The interrelationship of the certificate and rate proceedings and the consequences of that interrelationship were well expressed in *Atlantic Refining Co.* v. *F.P.C., supra,* 316

F.2d 677 at 679, where it was noted that, by imposing a price condition under Section 7,

> "the Commission, of course, does not foreclose a company from obtaining an increase under Section 4. As indicated, Section 4 is a rate proceeding and Section 7 is not. But the public must be protected from the time the gas first enters interstate commerce. Since there is no mechanism for refund of overcharges under Section 7, if the Commission is to err in setting an initial rate, it should err on the low side because the company, under Section 4, can immediately increase the rate, subject to disallowance by the Commission after a full rate proceeding, the public being protected with reference to refunds in the interim."

II. REFUND OF PAST OVERCHARGES

In view of the court's conclusion that cost-of-service data must be received in determining the price conditions, if any, which should be attached to a certificate, it is not in the least surprising that, in dealing with the question of refund of rates collected by the producers since 1958 under the judicially invalidated certificates, the court holds that refunds must be measured by the just and reasonable rate—fixed by reference to cost-of-service data—which might ultimately be determined for these sales. The court rationalizes its result on the ground that otherwise the consumer might receive a windfall.

A close analysis of the court's holding on refunds, however, reveals that it is based on a misunderstanding of the underlying legal theory on which the refunds here involved are premised; that it is inconsistent with the decisions of other circuits which hold that refunds may, in the proper circumstances, be ordered without

reference to costs; and that it is contrary to the clear policy expressed by this Court that refunds are only partial protection at best and, to be effective, should be ordered as promptly as possible.

The legal theory on which refunds are required where deliveries have been made under high-priced, judicially invalidated certificates is, in essence, one of partial rescission and restitution. There having been no valid certificates authorizing the sales at 23.5¢ per Mcf, the past transactions were contrary to law (specifically, Section 7(c) of the Natural Gas Act); and since complete bilateral restitution—return of the full purchase price by the seller and return of the gas received by the buyer—is obviously impractical, the next best alternative is chosen: the situation is recast as though the Commission had, in the first instance, issued valid certificates, i.e., certificates limiting the initial price to 20¢. See *Hunt Oil Co.* v. *F.P.C.*, 334 F.2d 474 at 479 (5th Cir. 1964).

Even where rate increase filings are made under Section 4—which specifically ties refunds of amounts collected thereunder to the portion of the increase found "not justified"—the courts have made it abundantly plain that in order for the rate applicant to retain the increased rate, he must prove both that he had a legal right to make the filing, see *United Gas Pipeline Co.* v. *Mobile Gas Corp.*, 350 U.S. 332 (1956), and that the increased rates are justified. Thus, a rate applicant under Section 4 may be required to make refunds without regard to whether the increased rate is just and reasonable if there was no legal basis for the filing. *Shell Oil Co.* v. *F.P.C.*, 334 F.2d 1002 at 1010-11 (3rd Cir. 1964). *A fortiori*, where an initial rate schedule

filed pursuant to a Section 7 certificate is involved, the sole question is the legality of the filing; where, as here, the filing was void *ab initio,* refunds are required.

Finally, the holding below is in sharp conflict with the policy considerations expressed by this Court in *F.P.C.* v. *Tennessee Gas Transmission Co.,* 371 U.S. 145 (1962), where, at 154-55, it was noted that, in view of the "somewhat illusory" protection afforded consumers by refunds, the Commission has the duty, "where refunds are found due, to direct their payment at the earliest possible moment consistent with due process." Accord, *Wisconsin* v. *F.P.C.,* 373 U.S. 294 at 324 n. (dissenting opinion); *F.P.C.* v. *Hunt,* 376 U.S. 515 at 524-25 (1964). In the present case, the 23.5¢ prices have been collected since 1958, a period of six years; obviously, the longer refunds are delayed, the more illusory is the protection afforded by the refund remedy.

III. THE MORATORIUM ISSUE

The holding of the court below that the Commission was powerless to condition its certification of the instant sales upon a requirement that the producers refrain from exercising their contract right to file rate increases above 23.55¢ pending the outcome of the Southern Louisiana area rate proceeding (or until July 1, 1967, if the area rate proceeding has not concluded by that date) is squarely in conflict with this Court's two most recent decisions dealing with the scope of the FPC's powers under Section 7— *F.P.C.* v. *Hunt,* 376 U.S. 515 (1964), and *F.P.C.* v. *Texaco,* 377 U.S. 33 (1964).

The court below sought to distinguish *Hunt* on the ground that that case involved a moratorium in a *temporary* certificate, and, indeed, it concluded that in

Hunt this Court limited the application of its *Catco* decision to situations involving temporary certificates. Such a reading of *Hunt* and *Catco* is plainly erroneous.[6] Although in *Hunt* this Court did specifically note that "the extent of [the Commission's broad discretionary power to condition certificates in order to hold the line in pricing] in permanent certification is not before us now," it is clear that the rationale of the decision applies as well to sales under permanent as to sales under temporary certification. For as this Court noted, "When the independent producer knocks on the door of the Commission for permission to enter his gas in interstate commerce he must submit to the requirements of Section 7"; and if does not like the conditions imposed by the Commission in the certificate tendered to him, he is free to reject the certificate and to sell his gas in the intrastate market or to refuse to sell it and await a better opportunity, *Atlantic Refining Co.* v. *Public Service Commission of New York*, 360 U.S. at 387.

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[6] In arriving at its conclusion as to the meaning of *Hunt* and *Catco*, the court below seized on what is obviously an inadvertent error in this Court's language in *Hunt* where, 376 U.S. at 523, it is stated:

> "This Court previously discussed the use of the temporary certificate procedure in *Atlantic Refining Co.* v. *Public Service Comm'n, supra.*"

Actually, there were no temporary certificates involved in the *Catco* case (a Commission proffer of a temporary certificate had been rejected by the producers, see 360 U.S. at 385), and as the Court's discussion in *Catco* and its summary of that discussion in *Hunt* make clear, the Court was discussing *conditioned* certificates and the scope of the Commission's conditioning power. The confusion in terminology stems from the fact that both a temporary certificate and a conditioned certificate, like a rate subject to refund under Section 4, share a common characteristic—lack of finality.

Surprisingly, the court of appeals did not even mention this Court's *Texaco* decision.[7] That case involved a much broader power than is involved here—the Commission's right to promulgate a rule barring certain price-escalation provisions in producer sales contracts —and the Court's language sustaining the Commission's power to prohibit inflationary filings by general rulemaking certainly justifies the Commission's power, in the closely parallel situation here presented, to accomplish similar results on an *ad hoc* basis:

> "Natural gas companies that seek to enter the field with prearranged escalator clauses and the like have a built-in device for ready manipulation of rates upward. Protection of the consumer interests against that device may be best achieved if it is done at the very threshold of the enterprise. At least the Commission may so conclude; and the legislative history makes clear that its authority reaches that far." 377 U.S. at 42-43.

In *Texaco,* as here, the evil to be avoided was the "vast proliferation of hearings" which would result if the Commission's remedial action were invalidated, 377 U.S. at 44.

CONCLUSION

The decision of the court below constitutes an unwarranted and drastic interference with a feasible, equitable, and administratively workable program for issuance of producer certificates evolved by the Federal Power Commission in response to the direction of this

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[7] Although the *Texaco* decision was handed down on April 20, 1964, after the filing of briefs below, it was discussed at some length during the oral argument, held June 2, 1964; and it is cited in a wholly different context, in the decision below, *infra,* p. 12a, n. 16.

Court in *Catco;* and by precluding the development of *any* feasible program of regulation, the decision below deprives the consumer of that "complete, permanent and *effective* bond of protection" intended by Congress. Accordingly, this petition for a writ of certiorari should be granted.

Moreover, in view of the obvious and clear conflict between the decision below and this Court's recent and definitive decisions on in-line pricing, refunds, and price moratoria in *Catco,*[8] *Tennessee,*[9] *Hunt,*[10] and *Texaco,* petitioner respectfully suggests that this case is an appropriate one for summary reversal. See *Public Service Commission of New York* v. *F.P.C.,* 361 U.S. 195 (1959).

Respectfully submitted,

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November 12, 1964

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[8] *Atlantic Refining Co.* v. *Public Service Commission of New York,* 360 U.S. 378 (1959).

[9] *F.P.C.* v. *Tennessee Gas Transmission Co.,* 371 U.S. 145 (1962).

[10] *F.P.C.* v. *Hunt,* 376 U.S. 515 (1964).

[11] *F.P.C.* v. *Texaco Inc.,* 377 U.S. 33 (1964).

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 20872

CALLERY PROPERTIES, INC., *Petitioner,*

v.

FEDERAL POWER COMMISSION, *Respondent.*

No. 20885

THE SUPERIOR OIL COMPANY, *Petitioner,*

v.

FEDERAL POWER COMMISSION, *Respondent.*

No. 20890

CAROLINE HUNT SANDS and LOYD B. SANDS, *Petitioners,*

v.

FEDERAL POWER COMMISSION, *Respondent.*

No. 20891

PLACID OIL COMPANY, *Petitioner,*

v.

FEDERAL POWER COMMISSION, *Respondent.*

No. 20892

MARGARET HUNT HILL, TRUSTEE FOR HASSIE HUNT TRUST, *Petitioner,*

v.

FEDERAL POWER COMMISSION, *Respondent.*

No. 20967

J. RAY MCDERMOTT & CO., INC., *Petitioner,*

v.

FEDERAL POWER COMMISSION, *Respondent.*

No. 20989

OCEAN DRILLING & EXPLORATION COMPANY, *Petitioner,*

v.

FEDERAL POWER COMMISSION, *Respondent.*

No. 21028

J. R. FRANKEL, ET AL., *Petitioners,*

v.

FEDERAL POWER COMMISSION, *Respondent.*

Petitions for Review of Orders of the Federal Power Commission.

(August 14, 1964.)

Before RIVES and BROWN, Circuit Judges, and GROOMS, District Judge.

BROWN, Circuit Judge: These cases present important questions under the Natural Gas Act, 15 USCA § 717. These include the nature of the hearing and the scope of the pertinent evidence bearing on price in a § 7 application for permanent certificate, the legality of retroactive rate refund, and the validity of a moratorium on post-certificate § 4 price increases.

The cases are not new for us, certainly not, as to one case. Their presence here bears out the prediction of the dissenter[1] that "this case will be back several years and thousands of pages later."[2] Without assaying the balance of the dissenter's prophesy that "no one will know more than is known now," it is ironic that we hold that we do not know enough because the Commission declined to receive and evaluate important evidence. Thus, in their fifth year, these applications must now go back to have the kind of hearing which we, and other Courts of Appeals, directed.

I.

These are all fallout from Catco[3] in which the Supreme Court reversed the unconditioned certificate because the 21.4¢ price was "out of line."

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[1] United Gas Improvement Co. v. FPC, 5 Cir., 1961, 290 F.2d 133, 138, 147 (dissenting opinion).

[2] The certificate of the records shows that some of these ran as high as 10,000 pages, others 5,000 and 6,000. Counsel, with the responsible concern demonstrated by Federal Power practitioners, public and private, have reduced it to 617 printed pages under our special FPC practice which became the forerunner of our amended Rules 23 and 24. See Hunt v. FPC, 5 Cir., 1962, 306 F.2d 334, 336, n. 1. The 17 briefs exceed 480 additional pages.

[3] Atlantic Refining Company v. Public Service Commission of New York, 1959, 360 U.S. 378, 79 S.Ct. 1246, 3 L.Ed.2d 1312.

Within a short time after affirmance by the Third Circuit on August 4, 1959, of the *Transco-Seaboard* case,[4] the FPC in 6 separate formal hearings involving a total of 69 producer applications issued unconditioned certificates for South Louisiana (and offshore) sales at initial contract prices ranging from 21.4¢ per Mcf where no tax reimbursement was due to 23.8¢ including tax reimbursement. But within 4 months, the Third Circuit's *Transco-Seaboard* decision was summarily reversed.[5] On appeals taken by various distributor-intervenors, the grant of the certificates was reversed by this Court and Courts of Appeals for the Third, Ninth, Tenth, and D.C. Circuits.[6]

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[4] United Gas Improvement Co. v. FPC, 3 Cir., 1959, 269 F.2d 865.

[5] Sub. nom. Public Service Commission of New York v. FPC, December 14, 1959, 361 U.S. 195, 80 S.Ct. 292, 4 L.Ed.2d 237.

[6] The original Commission opinions, and the court reversals are as follows (present petitioners shown in parentheses):

(1) Transcontinental Gas Pipe Line Co., Op. 315, 1958, 20 FPC, 264, aff'd sub nom. United Gas Improvement Co. v. FPC, 3 Cir., 1959, 269 F.2d 865, reversed mem. sub nom. Public Service Comm'n of New York v. FPC, 1959, 361 U.S. 195, 80 S.Ct. 292, 4 L.Ed.2d 237 (Placid in No. 20891, Hill in No. 20892, and Frankel in No. 21028).

(2) Texas Gas Transmission Corp., Op. 327, 1959, 22 FPC 378, reversed, Public Service Comm'n of New York v. FPC, D.C. Cir., 1960, 287 F.2d 146, cert. denied, 1961, 365 U.S. 880, 882, 81 S.Ct. 1030, 1031, 6 L.Ed.2d 192 (Callery in No. 20872, Sands in No. 20890, McDermott in No. 20967, and Ocean Drilling in No. 20989).

(3) California Co., 1959, 22 FPC 252, reversed, United Gas Improvement Co. v. FPC, 9 Cir., 1960, 283 F.2d 817, cert. denied, 1961, 365 U.S. 879, 881, 81 S.Ct. 1030, 6 L.Ed.2d 191, 192 (Superior in No. 20885).

(4) Sun Oil Co., 1959, 22 FPC 351, reversed, United Gas Improvement Co. v. FPC, 5 Cir., 1961, 290 F.2d 133, cert. denied, 1961, 368 U.S. 823, 82 S.Ct. 41, 7 L.Ed.2d 27.

(5) Sunray Mid-Continent Oil Co., 1959, 22 FPC 361, reversed, United Gas Improvement Co. v. FPC, 10 Cir., 1961, 287 F.2d 159.

(6) Superior Oil Co., 1959, 22 FPC 369, reversed, United Gas Improvement Co. v. FPC, 5 Cir., 1961, 290 F.2d 147, cert. denied, 1961, 366 U.S. 965, 81 S.Ct. 1926, 6 L.Ed.2d 1255 (Superior in No. 20885).

On May 10, 1961, the FPC consolidated the remanded proceedings with the Southern Louisiana area rate proceeding.[7] On January 10, 1963, the FPC denied motions of some intervenor-distributors for security on possible rate refunds. Expressing the view that it has "power to redetermine these proceedings on the basis of the respective records as originally made and in the light of additional facts of which we may take official notice" without further hearing, the Commission nevertheless determined to "adhere to the view that it would be fair and wiser in the present circumstances to offer the applicants a further opportunity to adduce evidence in docket numbers AR61-2 et al. in support of their proposed prices." But it ordered that rate collections "shall be subject to such refund provisions as the Commission may lawfully prescribe by its final order * * * to the extent, if any, that the rate which has been collected exceeds the rate ultimately found to accord with the requirements of the public convenience and necessity."[8] In overruling the petitions for rehearing, the FPC on March 7, 1962, severed the proceedings from AR61-2 and then "consolidated [them] for the limited purpose of determining the public interest, initial price, or prices, applicable to these pro-

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[7] Docket No. AR61-2, 26 Fed. Reg. 4296 (1961).

The area pricing was initiated by Statement of General Policy No. 61-1, issued September 28, 1960. 24 FPC 818 (1960); 18 C.F.R. § 2.56 (1961). By the First Amendment to Statement of General Policy No. 61-1, issued October 25, 1960, the FPC fixed an area price level of 21.5¢ per Mcf plus tax reimbursement. 25 Fed.Reg. 10,488 (1960). Subsequently, by the Fourth Amendment to Statement of General Policy No. 61-1, issued October 23, 1961, the FPC reduced the area price level for initial sales of gas from South Louisiana to 21.25¢ per Mcf, inclusive of tax reimbursement. 26 Fed. Reg. 10,342 (1961).

[8] Superior (our Case No. 20885—see Items (3), (6), note 6, supra, was not a party to this order.

ceedings.'"[9] In this order of March 7, 1962, the FPC noted that six weeks earlier, in the remanded Catco dockets, it had found the in-line level in south Louisiana to be 18.5¢ per Mcf, plus 1.5¢ tax reimbursement where applicable. Rejecting contentions by intervenor-distributors that a like finding should peremptorily be entered in these proceedings, the Commisison nonetheless concluded that it "should afford the producers further opportunity to be heard."

The hearings thus scheduled were held before an Examiner June 18-21, 1962. At the outset of the hearing, the producers sought to introduce what the Examiner described as "a tremendous mass of cost-type, economic and financial evidence." This cost-of-service evidence followed generally the pattern used by the Commission in prior determinations. Broadly speaking it demonstrated that on a cost-of-service basis the cost to the producers was considerably in excess of the contract price sought to be certificated in the pending applications. Other evidence bore upon the minimum financial requirements for finding and producing gas. These also used techniques and methods employed by the Commission in determining analogous minimum financial requirements. Other evidence showed the demand and supply situation existing both nationwide and in South Louisiana. Some was detailed, indicating that the demand for gas is increasing far in excess of the annual additions of gas supply. Other evidence tied this directly into the exploration for, and finding of, new gas supplies to meet the increased demands, the relation of field prices to those efforts, the impact of lowered prices on exploratory activity, and the like. Other evidence showed the nationwide increase in the current cost of new gas supply over the pre-Catco

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[9] Petitions to review the refund-warning order of January 10, 1962, were dismissed by us "without prejudice to the rights of petitioner to attack the validity of the orders * * * in petitions to review, * * * the orders of July 17, 1963, in the Commission's Opinion No. 398."

prices, the increase in the weighted average contract price in this period in relation to drilling and exploratory costs, and refutation of the assertion that contract prices in South Louisiana have leaped from plateau to plateau. We need not describe it in any greater detail since in affirming the Examiner's rejection of the evidence, the Commission characterized it as "economic and financial evidence" including that relating to "an individual company or on an area-wide basis" without regard to whether it was "the type characterized as cost-of-service studies, cash flow studies, demand-supply, cost, profit and market price trends, area cost-revenue trends, comparative well cost data and gas replacement costs * * *."

On the motion of the intervenor-distributor supported by Commission staff, the Examiner rejected all of this evidence. In his decision of December 7, 1962, he (1) concluded that the in-line price for the pending sales was 18.5¢ per Mcf plus 1.5¢ per Mcf tax reimbursement where applicable, (2) directed that the producers refund, with interest, all amounts previously collected in excess of the in-line levels of 18.5¢ and 20.0¢.[10] Accepting in the main all of the Examiner's findings and conclusions, the FPC by opinion 398, issued July 17, 1963, took these actions. It unanimously sustained the exclusion of producer cost data, and the finding that the in-line price was 18.5¢. By a 4-1 vote it approved the refunds.[11] In addition, the Commission—on the basis of a finding that rate filings to

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[10] The Examiner rejected a number of contentions of Staff and intervenor distributors, one of the Staff being that "excess" payments made to the producers under "take-or-pay" provisions for gas not delivered should be refunded.

[11] Refunds by Superior for collections under one temporary certificate prior to August 10, 1959, were excused based on the FPC's decision Skelly Oil Co. Op. 362, 1962, 28 FPC 401, subsequently reversed in Public Service Commission of New York v. FPC, D.C. Cir., 1964, 329 F. 2d 242.

levels in excess of 23.55¢ per Mcf would cause widespread triggering throughout Southern Louisiana — imposed a moratorium on filings in excess of 23.55¢ until July 1, 1967, or until the conclusion of the pending Southern Louisiana AR61-2 proceeding, whichever is earlier.[12]

Petitions for review have been filed by the producers (see note 6, *supra*). The questions presented for our decision are these. (1) Did the Commission err in excluding the proffered cost and economic evidence? (2) Did the Commission err in imposing a moratorium on price increases in a permanent certificate? (3) Did the Commission err in ordering refunds of the amounts previously collected? (4) Did the Commission err in fixing the in-line price at the 18.5¢ level? (5) Did the Commission err as to take-or-pay refund provisions? (6) Did the Commission err in making the refund order applicable to Frankel and Placid's Docket No. 13184?

II.

Exclusion of Cost Evidence

We think that a proper consideration of the Act and its elucidation in Catco demonstrates that the Commission erred in rejecting the proffered evidence on cost and other economic data. No doubt Catco is significant and binding, and we accept it without any effort to whittle it down. But the simple fact remains that it is a statute which we are expounding, and the statute does not refer to, much less speak of "in-line" price. To be sure, whether a proposed price is in-line or not is an important, sometime decisive, factor. But it is a factor to be weighed along with others in determining whether the proposed

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[12] The FPC rejected Staff's contentions on refund of take-or-pay prepayments, but it conditioned the certificates upon the ultimate outcome of a pending rule-making proceeding, R-199, review of which was recently held to be premature by the D.C. Cir., 1964, 229 F. 2d 242, 248.

sale of gas in interstate commerce "is or will be required by the present or future public convenience and necessity."[13]

In the Commission Catco proceeding the Commission presumably reasoning that a post-certification § 5 rate hearing would afford ample protection against improvident prices, declined altogether to consider the reasonableness of the proposed price or its relation to public convenience and necessity. This approach seemed to find some basis in the structure of the Act in which the statutory provisions concerning rates were found in §§ 4[14] and

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[13] Section 7(e), 52 Stat. 824, as amended, 56 Stat. 84, 15 USCA § 717f(e) provides:

"* * * [a] certificate shall be issued to any qualified applicant therefor authorizing the whole or any part of the operation, sale, service * * * covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of * * * the Act and the requirements, rules and regulations of the Commission thereunder, and that the proposed service, sale, operation * * * to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require."

[14] 15 USCA § 717c.

"4(a) All rates and charges made, demanded, or received by any natural-gas company for * * * the transportation or sale of natural gas * * * shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

"* * *

"(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission * * * schedules showing all rates and charges for any transportation or sale * * * together with all contracts which in any

5[15] and not in § 7 which dealt with the initial application for certification, temporary or permanent. This argument acquired some operational support from the magnitude of the administrative problems, both in time and manageability, of turning every § 7 application into a full blown rate hearing to determine whether the proposed rate was "just and reasonable."

The Supreme Court in Catco forcibly rejected this approach of the Commission. The Court made clear that price was indeed important. It recognized, of course, that "the Act does not require a determination of just and reasonable rates in a § 7 proceeding * * *" or "that a 'just and reasonable' rate hearing is a prerequisite to the issuance of producer certificates." And the Court pointed out that it was the delay in processing § 5 proceedings that "requires a most careful scrutiny and

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manner affect or relate to such rates, charges, classifications and services.

"(d) Unless the Commission otherwise orders, no change shall be made * * * in any such rate * * * except after 30 days' notice to the Commission and to the public * * *.

"(e) Whenever any such new schedule is filed the Commission shall have authority * * * to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing * * * may suspend the operation of such schedule * * * but not for a longer period than five months. * * * Where increased rates or charges are thus made effective, the Commission may * * * require the natural-gas company to furnish a bond * * * to refund, with interest, the portion of such increased rates or charges * * * found not justified. * * *."

[15] 15 USCA § 717d.

"5(a). Whenever the Commission, after a hearing * * * shall find that any rate, charge * * * collected by any natural-gas company * * * is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge * * * practice or contract to be thereafter observed and enforced and shall fix the same by order: * * *; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonabel rates."

responsible reaction to initial price proposals of producers under § 7." But the Court immediately tied price to public convenience and necessity by requiring that the price "proposal must be supported by evidence showing their necessity to 'the present or future public convenience and necessity' before permanent certificates are issued." The recent increase in the price levels, the Court went on, "does make price a consideration of prime importance" and "where the application on * * * presentation of evidence signals the existence of a situation that probably would not be in the public interest, a permanent certificate should not be issued." After stressing "public convenience and necessity" not less than six times in the space of two paragraphs, 360 U.S. 378, at 390-91, the Supreme Court for the first time articulates the "in-line" concept. "Where the proposed price is not in keeping with the public interest because it is out of line or because its approval might result in a triggering of general price rises or an increase in the applicant's existing rates by reason of 'favored nation' clauses or otherwise, the Commission in the exercise of its discretion might attach such conditions as it believes necessary." 360 U.S. 378, at 391.

The Court stressed that by certificate conditions under § 7, "the consuming public may be protected while the justness and reasonableness of the price fixed by the parties is being determined under other sections of the Act. Section 7 procedures in such situations thus act to hold the line awaiting adjudication of a just and reasonable rate." 360 U.S. 378, at 392. Of unusual importance here was the Court's statement in the analysis of the deficiencies of that record in which "no effort was made to give the 'reason why' * * * the proposed price was some 70% higher than the weighted average cost of 'existing gas to the purchaser.'"

As though Catco began and ended with "in-line" the Commission and the intervenor-distributors are mesmerized by this catch phrase into supposing that the Commission's responsibility is discharged with that limited

inquiry and if unsatisfied on that score, it is free to reject out of hand a producer's application for a new service. Catco did not so hold, and this approach ignores the plain terms of the statute which are no way diminished by Catco. Vast as is the discretion of the Commission, the statute, § 7(e), footnote 13, *supra*, accords positive rights to natural gas producers desiring to sell gas in interstate commerce. A producer does not, of course, have an absolute right to engage in the sale. It does, however, subject to compliance with reasonable procedural rules and requirements of the Commission[16] have an absolute right to a consideration of the application by the Commission and the right to have it granted "if it is found that the applicant is able and willing properly to do the acts and to perform the service * * * and the * * * sale * * * is or will be required by the * * * public convenience and necessity." The Commission does not, therefore, fulfill its statutory duty by the limited inquiry into whether the price is "in-line." Conversely, it has no power to deny the application solely on the ground that the price is not "in-line." To be sure, if the proposed price is not "in-line," this may become the dominant factor in denying the application. But it must be done as a part of the larger element of "public convenience and necessity." The Court makes this clear in *FPC* v. *Transcontinental Gas Pipe Line Corp.*, 1960, 365 U.S. 1, 8, 17, 22, 81 S. Ct. 435, 5 L. Ed. 2d 377: "In fact in interpreting this very section we said that 'Sec. 7(e) requires the Commission to evaluate all factors bearing on the public interest' * * *." Later, the Court states, "In this connection, it must be realized that the Commission's powers under Section 7 are, by definition limited. * * * The Commission cannot order a natural gas company to sell gas to users that it favors; it can only exercise a veto power over proposed transportation and it can only do

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[16] FPC v. Texaco, Inc., 1964, ... U.S. ...., ... S. Ct. ...., 12 L. Ed. 2d 112.

this when a balance of all the circumstances weighs against certification.'"[17]

In the concept of public convenience and necessity, price is, of course, very important. But it is not the whole thing. And certainly under a statutory scheme for a utility-type of regulation for the sale, not of a service, but of a depletable commodity,[18] where the Commission serves primarily as a rate-reviewing, not a rate-fixing agency,[19] and in which the entry into the regulated market is the voluntary act of the gas producer,[20] it is perfectly evident that many factors other than price alone bear upon public convenience and necessity and, in turn, upon price.

One of the most critical factors is, of course, the extent and nature of the demand. We decline to believe that the FPC can be oblivious to what all others know firsthand of occurrences since 1956-57, the era that begat the so-called Catco "in-line" price. Population is increasing at

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[17] Rejecting the Respondent's claim that the Commission had used its power to prevent a levering upward of field prices to bar direct sales of gas, it said: "Certainly such action would be contrary to our previous statements that the term 'public convenience and necessity, connotes a flexible balancing process, in the course of which all the factors are weighed prior to final determination. United States v. Detroit & Cleveland Navigation Co., supra.[19] * * * as the Commission stated, 'countervailing factors suffice to tip the balance against the grant of the authority requested by Transco.'"

Footnote 19 reads: "19. Compare the cases which have held that it was error for the Commission to refuse to consider certain factors within its power of notice. E.g., City of Pittsburg v. Federal Power Commission, 99 U.S. App. D.C. 113, 237 F. 2d 741."

[18] Chief Judge Tuttle has pointed out: "This is concededly a difficult standard to specify especially in light of the fact that producers are in reality selling gas which they own and are not, in the traditional sense, primarily furnishing a service to the public." Gulf Oil Corp. v. FPC, 5 Cir., 1958, 255 F. 2d 556, 557.

[19] United Gas Pipeline Co. v. Mobile Gas Service Corp., 1956, 350 U.S. 332, 76 S. Ct. 373, 100 L. Ed. 373.

[20] FPC v. Hunt, 1964, ... U.S. ...., ... S. Ct. ...., 11 L. Ed. 2d 878, 883.

explosive rates particularly in metropolitan areas in the South, Southwest and West Coast. What are, for example, the insatiable energy requiremnts of this ever-expanding population and industrial complex? If the demand is present, the next decisive question is, what about the supply? Can it reasonably be met by the gas now under dedication? Where and from what sources can the demand reasonably be satisfied? And whether this does, or does not, bring about price increases, the decisive question then becomes what price will it take to get the needed gas? The latter question, of course, sets in train a whole series of subsidiary inquiries. This is so because even under a system of voluntary initial dedication of gas, the acceptable price may not be measured by the intransigent demand of a producer. Inherent reasonableness in terms, say, of the likelihood that the needed supply of gas will be obtainable from others by exploration and new production and other similar questions would remain. Other factors could be named.[21] The important thing is that price is not the sole criteria.

A price-only approach does more than substitute for the statutory standard of "public convenience and necessity" a rigid, mechanical arithmetical guide. It is conceivable that such a test could imperil the public interest by foreclosing needed gas from the interstate market solely because the price is out of line. The so-called "in-line" concept necessarily involves a question of time—here in the neighborhood of 1956-57 prior to the contaminating influence of the initial Catco contract. It involves also a selection of so-called comparables and a rejection of those which are either "too high," or are

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[21] Several factors were mentioned just this term in FPC v. Hunt, 1964, ... U.S. ...., ... S. Ct. ...., 11 L. Ed. 2d 878. The Court there concluded that the purpose as revealed by the legislative history was to give the FPC "an opportunity to scrutinize the financial setup, the adequacy of the gas reserves, the feasibility and adequacy of the proposed services, and the characteristics of the rate structure."

thought to be so, or are otherwise "suspect."[22] Essential as it is that the Commission scrutinize carefully apparent price increases, it is inconceivable that Congress meant to freeze the rates to 1956-1958,[23] or to any other particular time for that matter.[24]

Rather, the public interest is protected by requiring the Commission to consider price in terms of the whole public convenience and necessity. Indeed, this was recognized by the Ninth Circuit in one of the very cases precipitating the remands now under review.[25] That Court rejected as being "without merit" the "contention that the price line must necessarily accord with the pre-Catco line." The Court went on, "we agree with the view expressed by the Commission in Texas Gas Transmission Corp. et al, 22 FPC 378, 388, that factors such as increased production costs since CATCO, comparative accessibility of field locations and comparative depth of

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[22] See Morris, Recent Independent Producer Certificate Cases: The "Suspect Order" Rule, 32 Geo. Wash. Law Rev. 489 (1964); Amerada Petroleum Corp., Op. No. 422, 1964, ... FPC .... [Nos. CI62-1544, March 23, 1964].

[23] The 18.5¢ per Mcf price fixed here was the figure previously determined to be appropriate in the remanded Catco case, 1962, 27 FPC 96. This line was actually a 1956 level.

> The Commission forecasts that the area proceedings will result in just and reasonable rates. But it recognizes that "[to hold the line] does not mean that irrespective of evidence to the contrary an absolute price freeze is to be imposed until some future date when area proceedings ultimately establish 'just and reasonable' rates."

In re Amerada Petroleum Corp., Op. 422, 1964, ... FPC ...., ... [Docket No. C162-1544, March 23, 1964].

[24] Indeed, the very nature of present and future public convenience and necessity forbids a look-back to 1956-57 only. The inquiry must include the time of the award. FCC v. Pottsville Broadcasting Co., 1940, 309 U.S. 134, 145, 60 S. Ct. 437, 84 L. Ed. 656; Easton Publishing Co. v. FCC, D.C. Cir., 1950, 185 F. 2d 987, 991.

[25] See (3), note 6, supra.

sands tend to make pre-CATCO prices irrelevant for comparative purposes in other cases." *United Gas Improvement Co.* v. *FPC*, 9 Cir., 1960, 283 F.2d 817, 823. Earlier that Court stated that " * * * the Commission properly refers to circumstances under which an unconditional and permanent certificate might be issued notwithstanding the fact that the proposed price is out of line." 283 F.2d 817, 821.

And this same theme was echoed by each of the other remanding Courts. "It is conceivable" said the Tenth Circuit, "that in some circumstances public convenience and necessity may require certificating of a sale when the price is 'out of line.'"[26] The D.C. Circuit pointed out alternative courses for the Commission where the "prices * * * are suspiciously higher." One course was to impose interim conditions. As to the other, it offered this solution. "On the other hand, it [the Commission] may grant unconditional certification upon evidence sufficient to 'support a finding of public convenience and necessity.'"[27] We spoke in terms of burden making "it * * * clearly incumbent on the proponent of [the proposed] rate to make some showing of the 'reason why' (as it was expressed in the Catco opinion) * * *," the proposed rate was a proper initial rate in view of rates half that high just a few years before.[28]

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[26] United Gas Improvement Co. v. FPC, 10 Cir., 1961, 287 F. 2d 159, 163.

[27] Public Service Commission v. Federal Power Commission, D.C. Cir., 1960, 287 F. 2d 146, 149. The Court then remanded as follows: "The order, insofar as it grants unconditional certification to the initial price proposals of the producer applicants, is reversed and the case is remanded to the Commission for further proceedings in which the producer applicants may, if they so choose, either augment the record so as to support a certification without price condition, or seek certification appropriately conditioned." 287 F. 2d 146, at 150.

[28] United Gas Improvement Co. v. FPC, 5 Cir., 1961, 290 F. 2d 133, 138.

Evidence of the kind proffered by these petitioners bore upon these questions of public convenience and necessity. That the evidence would, in whole or in part, be pertinent to a § 4 or § 5 "just and reasonable" rate hearing is a matter of no decisive significance. If it proves too much, or proves too little, this is a matter calling for the expert evaluation and judgment of the Commission.[29] We have no fear that with resourceful ingenuity the Commission can develop procedural devices which will keep these § 7 hearings from being bogged down into the full dress § 4 or § 5 rate hearing. Its awesome task calls for great administrative inventiveness which will assure to all, producer, consumer, and public alike, the full measure of statutory rights. *Hill* v. *FPC*, 5 Cir., 1964, ... F.2d ...., ..., n. 27 [Nos. 20375, 20386, July 23, 1964].[30]

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[29] The argument that to receive evidence of this nature is to allow a producer a fair rate of return on excessive costs is a non sequitur. We agree with Judge Wright that "The Commission is not required to subsidize high cost producers with consumers' money." Atlantic Refining Co. v. FPC, D.C. Cir., 1963, 316 F. 2d 677, 680. But whether costs are "too high" or even "high" are comparative factual matters calling for evidence and evaluation.

[30] Following the Supreme Court's lead in its admonition that the Commission must find ways to expedite proceedings, we there pointed out that much delay flows from an overuse of motions to dismiss instead of an evaluation of evidence for its intrinsic worth in the light of the Commission's expertise. The instant cases graphically illustrate that a motion to strike evidence relating to complex activities is an equally awkward procedural device of limited utility. For all we know, had the Commission received the proffered evidence, it would have held it to be wanting, and that might well have been the end of the matter. Now the case must go back and proceed through lengthy hearings, rehearings, exceptions, arguments before the Commission, rehearings and reargument to receive and evaluate this very evidence. In terms of time and the public interest, the apparent time-saving device of striking this evidence as irrelevant has proved again that the shortest way through is often the longest way around. Determining the utter and irretrievable irrelevance of a large body of evidence under the nuances of a concept as elusive as public convenience and neces-

The task facing the Commission in this developing field calls for innovation and adaptation. It is not, therefore, enough merely to inquire whether the price is "in-line." On the other hand, for § 7 purposes, there need not be a full dress § 4 or § 5 rate hearing. The Commission must, however, hear and evaluate all relevant evidence bearing on public convenience and necessity when it is urged, or held,[31] that the proposed price is out of line.[32]

III.

Price Moratorium

So far as rates are concerned, the Commission did two principal things. First it conditioned the permanent certificate on a reduction of the initial rate to 18.5¢ per Mcf. Second, it found that there was a triggering[33] at 23.55¢

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sity is indeed a summary procedure. And we have many times pointed out that summary procedures "present a treacherous record for deciding issues of far-flung import, on which • • • [Courts] should draw inferences with caution from complicated courses of legislation • • • and practice." Kennedy v. Silas Mason Co., 1948, 334 U.S. 249, 257, 68 S. Ct. 1031, 92 L. Ed. 1347; Chapman v. Hawthorne Flying Service, 5 Cir., 1961, 287 F. 2d 539, 541.

[31] Nothing will keep the Commission from doing this by a two-step proceeding. See Hill v. FPC, supra. Indeed, this Court has recently approved separate trial by separate juries of validity-infringement on the one hand and damages on the other in patent cases. Swofford v. B. & W., Inc., 5 Cir., 1964, ... F. 2d .... [No. 21024, July 28, 1964].

[32] The evidence relating to cash outflow and replacement cost proffered and rejected in Public Service Commission of New York v. FPC, D.C. Cir., 1964, 329 F. 2d 242, was much more limited than that here. Nor do we regard California Oil Co. v. FPC, 10 Cir., 1963, 315 F. 2d 652 (inquiry as to what the line was); Atlantic Refining Co. v. FPC, D.C. Cir., 1963, 316 F. 2d 677 (question of in-lineness stipulated to be sole issue), as holding contrary to our decision.

[33] Some of the proffered but rejected evidence, see Part II, supra, actually touched on the factual basis, or lack thereof, of the Cateo assumption that "new price plateaus will • • • be created." 360 U.S. 378, at 390. We assume, however, that there was a factual basis for the Commission's finding.

and in order to prevent retriggering, it prohibited the producers from exercising their contract rights to file rate increases above 23.55¢ until the conclusion of AR61-2 or July 1, 1967, whichever is earlier. That moratorium does permit, however, increases from 18.5¢ up to 23.55¢.[34]

Although the Supreme Court stated that the "extent of [the] power [to condition price changes] in permanent certification is not before us now," we think the full import of its recent decision, reversing this Court, *Federal Power Commission* v. *Hunt*, 1964, ... U.S. ...., 84 S.Ct. ...., 11 L.Ed.2d 858, 886, compels a holding that the Natural Gas Act forbids a moratorium on price increases as a condition to the issuance of a permanent certificate.

Of course the statute gives the Commission the power to attach "such reasonable terms and conditions" to the issuance of the certificate "as the public convenience and necessity may require." See footnote 13, *supra*. Literally, no distinction is made between temporary and permanent certificates. And undoubtedly there are a number of conditions which lawfully may be attached to the issuance of a permanent certificate.[35] But as the Court did there, when we examine the interplay between § 7 on certification and §§ 4 and 5 on "just and reasonable" rates and rate changes, we think that Congress did not intend that the Commission have the power by a certificate condition to supersede the working of § 4. By § 4 Congress established a statutory scheme in which rates are prescribed and become effective by contractual provision. *United Gas Pipeline Co.* v. *Mobile Gas Service Corp.*, 1956, 350 U.S. 332, 76 S.Ct. 373, 100 L.Ed. 373; *United Gas Pipeline Co.* v. *Memphis Light, Gas & Water Division*, 1958, 358 U.S. 103, 79 S.Ct. 194, 3 L.Ed.2d 153.

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[34] The moratorium has a present impact. See, e.g., Superior's contract with United permitting escalation to 23.5¢ plus 2.3¢ tax reimbursement.

[35] ... U.S. ..., ... S. Ct. ..., 11 L. Ed. 2d 878, 885, n. 3.

There is no real question about the operative process or effect of § 4(e). Subject only to suspension for a limited brief period of time and the obligation to refund on final determination, the rates prescribed in the contract become effective when filed. The only real problem is the point at which the rights of a producer and the powers of the Commission under § 4 become applicable. This the Court answers squarely in *Hunt*. "Under the procedures of the Act, it is at the point of permanent or unconditional temporary certification that the provisions of § 4 become applicable." .... U.S. ...., ... S.Ct. ...., 11 L.Ed.2d 878, at 884. It is at that point that "the gas has been permanently certificated into interstate commerce * * *" and, the Court continues, at that point "the independent producer is then free to pursue the rate filing procedure of that section."

Other parts of the opinion make clear that the critical distinction is between the temporary, conditional certificate, on the one hand, and a permanent certificate on the other. Thus the Court points out, "once a permanent certificate is granted, the Commission can correct an improper rate only under § 5 of the Act * * *," .... U.S. ...., 11 L.Ed.2d 878, 883. In view of the necessity for some character of certificate before the gas "can move into interstate commerce" and the statutory right to apply "for temporary authorization" the Court recognizes that "* * * the Commission must have the authority to condition a temporary certificate so as to avoid irreparable injury to affected parties." But, the Court goes on, this "* * * condition, once imposed, continues only during the pendency of the producer's application for a permanent certificate." .... U.S. ...., 11 L.Ed.2d 878, 884. And some of the more sweeping statements made in Cateo[as] where reference was made to conditional certificates without indication as to permanent or temporary must now be read as conditional *temporary* certificates. For the Court,

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[as] 360 U.S. 378, 79 S. Ct. 1246, 3 L. Ed. 2d 1312.

immediately preceding an extensive quotation from Catco, put its own characterization on the nature of the certificates being dealt with in Catco when it said, "this Court previously discussed the use of the *temporary* certificate procedure in" Catco. (Emphasis supplied.) ....U.S. ...., 11 L.Ed.2d 878, 884.

The correctness of our holding is demonstrated by the peculiar facts of this record. For applications filed in 1958,[37] the Commission asserts the power to compel the producer to sell gas for nearly ten years[38] at a price substantially less than the opening contract price and without the opportunity of being able to ever seek and obtain the automatic stepped up price increases provided for in the contract. Thus, for nearly half of the twenty-year contract period[39] through the guise of a "price" condition, the Commission obtains an irrevocable dedication[40] of the gas to interstate sale and an effectual denial of any opportunity for the producer to exercise the legisla-

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[37] The Placid and McDermott applications, filed September and December 1958, are typical. There were some as early as April 1957.

[38] The moratorium runs until July 1, 1967, or until any earlier final decision in AR61-2. Ar61-2 is still going strong. Its earlier counterpart, the Permian Basin hearing, AR61-1, is pending for decision before the Examiner. The briefs inform us that Chairman Swidler has stated that it will be March of 1965 before 61-1 is decided by the Examiner and the end of 1965 before 61-2 is forthcoming. Oil & Gas Journal 62 (March 16, 1964). A minimum of two years more will be required before they grind through Commission review to land in some Court of Appeals for judicial review. See Wisconsin v. FPC, 1963, 373 U.S. 294, 83 S.Ct. 1266, 10 L. Ed. 2d 357; FPC v. Texaco, 1964, ... U.S. ...., 84 S. Ct. ...., 12 L. Ed. 2d 112, 119, n. 13.

[39] Superior's contract with United covering Bayou Penchant and other leases in Terrebonne Parish and the November 1, 1957, contract between Hassie Hunt Trust and Transco appear to be typical.

[40] Since all petitioners have made sales, none is free to withdraw its reserves from dedication. J. M. Huber Corp. v. FPC, 3 Cir., 1956, 236 F. 2d 550.

tive right to file, subject to suspension and refund, contractual rate increases. If the Commission may do it for half of the period, there is no reason why it may not do so for all. Congress could hardly have intended to delegate the power of legislative repeal by any such easy route.

Actually, the Commission's argument for moratorium power harkens back to the like contention made to support exclusion of pertinent economic data dicussed in Part II above. Here, as there, it insists that it must have the power to impose a price moratorium because the alternative is either to force a full blown § 4 or § 5 "just and reasonable" rate hearing, which is an unmanageable administrative problem, or exclude the needed gas from the market until such time as such a hearing can be conducted. But as there, we fail to see that it is a case of either or. If the kind of hearing which the particular facts of a particular application require[41] for determination of "public convenience and necessity," it is to be assumed that the Commission will issue a permanent certificate only if the initial contract price is in line or, if out of line, meets the statutory standard of public convenience and necessity. Full protection to the consumer is thereafter accorded so far as subsequent contract rate increases are concerned under the suspension and refund procedures of § 4(e). If, in that situation, there might be some further triggering impact, then that would flow from the unique statutory scheme which Congress, not the Commission nor the Courts, are free to change no matter how unsound some might think it to be.

The Commission's brief recognizes that it "is true that in *CATCO, Texaco, Inc.* v. *FPC* * * *, *Atlantic Refining Co.* v. *FPC* and *California Oil Co.* v. *FPC* cited by [certain of the petitioners] the Courts assumed that any rate increases contractually permitted could be filed under Section 4 at any time after operations were commenced under

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[41] There are no hard and fast rules. Adaptation is the order of the day in this undulating field. See Hill v. FPC, 5 Cir., 1964, F. 2d [Nos. 20375, 20376, July 23, 1964].

a certificate."[42] But it treats these as judicial aberrations resulting presumably from a failure on the part of the Commission "to meet its hold-the-line obligation by a moratorium condition." This leads the Commission's counsel to claim the necessity for, and the existence of, a power to take whatever action, impose whatever conditions to assure that "excessively high prices are absolutely prevented from being charged." But no matter how commendable that policy may be, the Commission may not supersede § 4 to accomplish it.

IV.

Retroactive Refunds

After fixing the initial price at 18.5¢ per Mcf, the Commission in its conditions also required that the producers refund, with interest, the excess over that figure which had been collected under the judicially reversed unconditioned certificates.

The producers make three principal attacks on this refund order. The first one—that the intervenor-distributors should have sought to stay gas deliveries pending determination in the respective Courts of Appeals[43] of their petitions for reviews—has little merit. Quite apart from any problem of whether intervenor-distributors could have met applicable standards for a stay,[44] the producers' plight

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[42] Commission Br. 39. The cases referred to are: Cateo, 360 U.S. 378; Texaco, Inc. v. FPC, 5 Cir., 1961, 290 F. 2d 149, 156; Atlantic Refining Co. v. FPC, D.C. Cir., 1963, 316 F. 2d 677; California Oil Co. v. FPC, 10 Cir., 1963, 315 F. 2d 652, 660; see also Willmut Gas & Oil Co. v. FPC, D.C. Cir., 1961, 294 F. 2d 245.

[43] See note, 6, supra.

[44] The intervenors stress, for example, Virginia Petroleum Jobbers Association v. FPC, D.C. Cir., 1958, 259 F. 2d 921; Eastern Airlines, Inc. v. CAB, 2 Cir., 1958, 261 F. 2d 830; Airport Commission of Forsyth County v. CAB, 4 Cir., 1961, 296 F. 2d 95, 96; Associated Securities Corp. v. SEC, 10 Cir., 1960, 283 F. 2d 773, 774-75; and Armour & Co. v. Freeman, D.C. Cir., 1962, 304 F. 2d 404, 406-08, 418.

was not brought about by the failure of the petitioning intervenors to obtain a stay, but came from the action of the producers in making the deliveries under certificates which though final, were then under direct judicial attack and subject as any competent Power Commission counsel would know, to the possibility of judicial reversal. The risk inherent in making deliveries pending final judicial determination was obvious to the producers. It was up to them to seek interim protective relief from the Commission, and there is no indication that extensions of time or other appropriate relief would have been declined by the Commission.

In the second attack some petitioners[45] apparently contend that the Commission could not order refunds because the original unconditioned certificates were not "vacated" or "set aside" by the Courts. Other petitioners urge the opposite—no refund right because certificates were "vacated." The wording of the remand orders vary, those of the Ninth Circuit,[46] Tenth Circuit,[47] and this Circuit[48] spoke in terms of "vacating" or "setting aside," whereas those in the D.C. Circuit[49] and the Third Circuit, following the Supreme Court's mandate,[50] spoke in terms of being remanded for further proceedings. But we agree with the Commission that by the choice of one rather than the other terminology, the remanding Courts intended no distinctive difference in effect.[51]

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[45] See, e.g., No. 20989 (Ocean Drilling), No. 20872 (Callery), and No. 20891 (Placid).

[46] 283 F. 2d 817, at 826.

[47] 287 F. 2d 159, at 163.

[48] 290 F. 2d 133, at 138; 290 F. 2d 147, at 149.

[49] 287 F. 2d 146, at 150.

[50] 361 U.S. 195.

[51] For reasons elucidated in Part II, we reject, however, the further contention of the Commission (Commission Br. 45-47) that "price" was the only issue on the remand.

The third, and serious, attack made by all is that the operative effect of the refund is that of a reparation order.[52] Under the structure of the Act, it has long been recognized, and never questioned, that "* * * under the Act the Commission has no power to make reparation orders. And its power to fix rates admittedly is limited to those 'to be thereafter observed and in force.'" *FPC* v. *Hope Natural Gas Co.*, 1944, 320 U.S. 591, 618, 64 S.Ct. 281, 88 L.Ed. 333.[53]

Although, as we point out shortly, these principles call for a special adaptation in the refund order, we think that the petitioners ignore the unusual circumstances of this case. By the remand orders (note 6, *supra*), all of the Courts of Appeals held that the unconditioned permanent certificates were improperly issued. It is one thing for a Court to rule that under a valid certificate the Commission lacks the power to retrospectively review rates and impose retroactive refund orders. It is quite another for a Court to conclude that a Commission lacking the power to do the former may yet not have inherent power to recapture the fruits obtained under an invalid, that is illegal, order. Thus, under the unique circumstances of this case, refunds are proper.[54]

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[52] As we indicated earlier (note 8, supra), Superior was not a party to the refund warning order of January 10, 1962. In our view, the order has no significance one way or the other.

[53] Montana-Dakota Util. Co. v. Northwestern Pub. Serv. Co., 1951, 341 U.S. 246, 71 S. Ct. 692, 95 L. Ed. 912; Panhandle Eastern Pipeline Co. v. FPC, 3 Cir., 1956, 236 F. 2d 289, 292. The Supreme Court in T.I.M.E. v. United States, 1959, 359 U.S. 464, 469-70, 79 S. Ct. 904, 3 L. Ed. 2d 952, has recently said of *Montana-Dakota*: "It was held that the Federal Power Act, which like the Motor Carrier Act expressly declares unreasonable rates to be 'unlawful', does not create a cause of action for the recovery of allegedly unreasonable past rates * * *."

[54] In so holding we do not accept the Commission's argument that it has some general powers to protect public rights similar to that of the NLRB in reinstatement and back pay awards in unfair labor practice cases. The propriety of the refund here stands on the peculiar circumstances of this case.

We have here an unusual situation. On the one hand we hold that producers cannot carry the general principle forbidding reparational orders to the point where it permits them to retain, without question, what was obtained under invalid orders. That means that refunds of excess collections are required. But there is no reasion why the producers should, in point of time, be required to refund the difference between the amount collected and the conditioned price as soon as it is determined. Refund at that point is not required to serve any public purpose, or reimburse consumers for excess charges. It may, however, impose irreparable loss to the producers. One public interest is, of course, against triggering. But in these five to six years any triggering effect has already taken place, and its impact has been felt. This clock cannot be turned back. As to consumers, they are ultimately entitled to a refund only to the extent that payments made here exceeded a "just and reasonable" rate.

The problem then is to accommodate what we regard to be the inherent power of the Commission to prevent detriment to the consumers to the needs of this case. To balance the two it means that the refunds for collections made during this long period can be determined only after the "just and reasonable" rate is fixed by an appropriate § 4 or § 5 proceeding.

Indeed, it is the operative impact of the policy against reparations, see note 53, *supra*, which makes this necessary. If the present refund order is affirmed, the producers must repay the difference between the conditioned price and the amount collected. In a § 4 or 5 rate hearing, it may well, however, turn out the "just and reasonable" rate is determined to be higher than the conditioned price.[55]

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[55] We agree with the Commission and the intervenor-distributors that in the § 7 proceedings here ordered, the inquiry on public convenience and necessity is not synonymous with determination of "just and reasonable" rate to be fixed under § 4 or § 5. This forces the conclusion that the conditioned price may well be different from the rate ultimately fixed.

But if the refunds have been made, that would be an empty ruling since there would be neither a legal right nor a practicable means for the producers to recapture that portion of the excessive refunds. *Atlantic Seaboard Corp.* v. *FPC*, 4 Cir., 1953, 201 F.2d 568, 572; *Sohio Petroleum Co.* v. *FPC*, 10 Cir., 1961, 298 F.2d 465, 467. The result, of course, would be that the consumers during the interim would have had gas at a rate less than "just and reasonable." No consumer is entitled under the statute to that. Nothing in the law should encourage that result or its possibility. And for it to occur means more than an undeserved windfall for favored customers. It means that other rate-payers are absorbing this deficiency and are therefore paying more than they should.

Such an approach is all the more required in view of the action which we take in remanding these cases for yet further hearings. Finding, as we do, significant procedural defects, we cannot sustain the conditioned price of 18.5¢. What that price will be, or whether there will be a price condition, must await the outcome of the further hearings. Refunds at the present time would be premature. At the same time this imposes no impossible administrative burden.[56] When and as the Commission on further hearings fixes the conditions, it can prescribe the necessary

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[56] If, as the Commission contends, our ruling requires a § 7 hearing bordering on a § 4, 5 rate case, there is no reason why the Commission as to these particular cases does not consolidate with the remanded certification proceedings a § 4 or 5 rate case. Consolidation has been ordered before, see, e.g., Texas Eastern Gas & Transmission Co. v. FPC, 5 Cir., 1962, 306 F. 2d 345, 349, cert. denied, 1963, 375 U.S. 941, 84 S. Ct. 347, 11 L. Ed. 2d 273. Where these cases started out with 69 producer applicants, settlements have washed out all except these petitioners. As a precedent, our ruling is something less than the specter supposed, since the Commission, and many others including this Court, look with hope to the day when the area pricing procedure will supply most of the answers. Hunt v. FPC, 5 Cir., 1962, 306 F. 2d 334, 343; Hill v. FPC, 5 Cir., 1964, ... F. 2d ...., ... [Nos. 20375, 20386, July 23, 1964]; Wisconsin v. FPC, 1963, 373 U.S. 294, 83 S. Ct. 1266, 10 L. Ed. 2d 357.

security to assure that the refunds, when ultimately fixed, will be paid and to or through the proper parties.

We agree that refunds can be required.[57] But to meet the exigencies of this unique case, they must be based, not on the conditioned price when fixed, but on the difference between the price collected and the rate found in a proper proceeding to be the "just and reasonable" one.[58]

V.

The "In-Line" Price Established

The petitioners assert that in arriving at the in-line price of 18.5¢, the Commission improperly excluded many higher, finally certificated prices, failed to give proper weight to prices approved by the Commission's own settlements in similar cases, and failed generally to give proper evaluation to the evidence showing contract prices from which to infer the "in-line" price. This, and the petitioner's related contention, that the evidence demonstrated an in-line price not less than the contract price are matters on which we need not express any view. The remand for further hearing to receive all pertinent evidence, see Part II above, means that these aspects are likewise open for rehearing and redetermination.[59]

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[57] We think it inappropriate at this time to express any views as to interest or the rate, if interest is to be allowed.

[58] As to Frankel's petition [No. 21028] and Placid's contention as to sales from its well No. 1, Raceland Field, we need only say that, subject to the principles we have discussed as to refunds generally, we agree with the Commission that it is appropriate to require that these producers make whatever refunds are ultimately found to be due for collections made during the time of their respective operations.

As to Superior's petition, except for the Commission allowing a grace period up to August 10, 1959, for sales under one temporary certificate, not here challenged, though similar action was disapproved in Public Service Co. of New York v. FPC, D.C. Cir., 1964, 329 F. 2d 242, 250, there appears to be no substantial difference between this record and the others.

[59] It should be clear that all we say about the "price" itself is equally applicable to the tax reimbursement element.

VI.

Take-or-Pay Provisions

In accordance with its earlier decision in Skelly, 1962, 28 FPC 401,[60] the Commission ordered that the take-or-pay provisions in the contracts should be subject prospectively to the Commission's future order in a pending rule-making proceeding, Docket No. R-199 with a provision that producers would not be required to file take-or-pay provisions for less than 80% of the annual contract quantities.

Superior alone contends that for gas not delivered there is no sale, and therefore take-or-pay provisions are beyond the jurisdiction of the Commission under the exclusionary language of § 1(b), 15 USCA § 717(b). When viewed realistically in the light of the imperative necessity for long term gas supply commitments, we agree with the Commission that this arrangement constitutes a sale within its power of regulation.

Under the peculiarities of this case with service having long ago been commenced and with no suggestion on the part of anyone that they wish to terminate it, we agree with the D.C. Circuit in its holding that this phase of the order does not presently present a reviewable matter. *Public Service Corp. of New York* v. *FPC*, D.C. Cir., 1964, 329 F.2d 242, 248; see also *Humble Oil & Refining Co.* v. *FPC*, 5 Cir., 1956, 236 F.2d 819, cert. denied, 1957, 352 U.S. 967, 77 S.Ct. 354, 1 L.Ed.2d 321.

The causes are therefore reversed and remanded to the Commission for other and further proceedings consistent with this opinion.

Reversed and Remanded.

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[60] Public Service Corp. of New York v. FPC, D.C. Cir., 1964, 329 F. 2d 242.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 20872*

CALLERY PROPERTIES, INC., *Petitioner,*

versus

FEDERAL POWER COMMISSION, *Respondent.*

On Petition to Review Orders of the Federal Power Commission

Before RIVES and BROWN, Circuit Judges, and GROOMS, District Judge.

Judgment

This cause came on to be heard on the petitions of Callery Properties, Inc., The Superior Oil Company, Caroline Hunt Sands and Loyd B. Sands, Placid Oil Company, Margaret Hunt Hill, Trustee for Hassie Hunt Trust, J. Ray McDermott & Co., Inc., Ocean Drilling & Exploration Company, and J. R. Frankel, et al., for review of Orders of the Federal Power Commission issued on July 17, 1963 and September 11, 1963, in Docket Nos. G-13183, et al., and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered, adjudged and decreed by this Court that the Orders of the Federal Power Commission in those causes be and the same are hereby reversed; and that these causes be, and they are hereby remanded to the Commission for other and further proceedings consistent with the opinion of this Court.

August 14, 1964

Issued as Mandate:

* Judgment also entered in Nos. 20885, 20890, 20891, 20892, 20967, 20989, 21028.

APPENDIX C

Natural Gas Act

Section 4. (a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

* * * * * * *

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, or State commission, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such sched-

ule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect: *Provided*, That the Commission shall not have authority to suspend the rate, charge, classification, or service for the sale of natural gas for resale for industrial use only; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company, making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible. [52 Stat. 822 (1938); 15 U. S. C. § 717c]

SECTION 5. (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission,, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or

sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however,* That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural-gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural-gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates. [52 Stat. 823 (1938); 15 U. S. C. § 717d(a)]

SECTION 7. (c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however,* That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on the effective date of this amendatory Act, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceeding, if application for such certificate is made to the Commission within ninety days after the effective date of this amendatory Act. Pending the determination of any

such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however*, That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest. [52 Stat. 825 (1938), as amended, 56 Stat. 83 (1942); 15 U. S. C. § 717f(c)]

* * * * * * *

(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require. [56 Stat. 84 (1942); 15 U. S. C. § 717f(e)]

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. [redacted] ,26

OCEAN DRILLING & EXPLORATION COMPANY,
Petitioner,

v.

FEDERAL POWER COMMISSION,
PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
THE UNITED GAS IMPROVEMENT COMPANY,
LONG ISLAND LIGHTING COMPANY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Supreme Court of the United States

OCTOBER TERM, 1964

No. .....

OCEAN DRILLING & EXPLORATION COMPANY,
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v.

FEDERAL POWER COMMISSION,
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THE UNITED GAS IMPROVEMENT COMPANY,
LONG ISLAND LIGHTING COMPANY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, OCEAN DRILLING & EXPLORATION COMPANY, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled cause on August 14, 1964.

CITATION TO OPINIONS BELOW

The opinion and judgment of the Court of Appeals for the Fifth Circuit are reported at 335 F. 2d 1004 and are printed as Appendix B hereto, *infra* pp. 3a-33a.

JURISDICTION

The judgment of the Court of Appeals was entered on August 14, 1964. Jurisdiction of this Court is invoked under 28 U.S.C., § 1254(1).

QUESTION PRESENTED

Whether the Federal Power Commission has authority under Section 7(e) of the Natural Gas Act to require producers to refund amounts previously collected pursuant to unconditional permanent certificates.

STATUTES INVOLVED

This case involves primarily Section 7(c) and Section 7(e) of the Natural Gas Act, 15 U.S.C., § 717f(c) and 717f(e). These sections of the Act are set out in Appendix A, *infra*, pp. 1a-2a.

STATEMENT

On August 9, 1959, the Federal Power Commission (Commission) issued Opinion No. 327[1] granting Ocean Drilling & Exploration Company (ODECO) unconditional permanent certificates of public convenience and necessity authorizing sales of gas to Hope Natural Gas Company (Hope) at a price of 21.5¢ per Mcf plus tax reimbursement of 2.05¢ per Mcf. The Public Service Commission of New York (New York) sought judicial review of Opinion No. 327 but did not seek to stay its effectiveness.[2] Therefore, ODECO filed its contracts with the Commission and commenced deliveries of gas. With *CATCO*[3] as a guide the

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[1] 22 FPC 378 (1959).

[2] New York did not seek a stay from the Commission or the reviewing court. In this regard Section 19(c) of the Natural Gas Act, 15 U.S.C. 717r(c), provides:

> "(c) The filing of an application for rehearing under subsection (a) shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order."

[3] *Atlantic Ref. Co.* v. *Public Serv. Comm'n*, 360 U.S. 378 (1959).

Court of Appeals for the District of Columbia[4] reversed the Commission and remanded the proceedings to the Commission to give the producers the opportunity to augment the record to support their contract prices.

After the mandate returned from the Court of Appeals the Commission, contrary to the procedure followed in the remanded *CATCO* proceedings, took no action.[5] In the remanded *CATCO* proceedings the Commission immediately issued temporary certificates containing refund clauses to replace the permanent certificates vacated by the Supreme Court. Finally, on May 10, 1961, the Commission consolidated the remanded proceedings with the Southern Louisiana Area Rate Proceeding in Docket No. AR61-2.

On January 10, 1962, the Commission issued an order warning ODECO that it intended to grant refunds to the extent it was empowered to do so at the conclusion of the proceeding (R. 395). On March 7, 1962, the Commission issued an order denying ODECO's Application for Rehearing of the January 10, 1962 order;[6] severing its certificate

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[4] *Public Serv. Comm'n* v. *FPC*, 287 F. 2d 146 (D.C. Cir. 1960), *cert. denied*, 365 U.S. 880 (1961).

[5] After the CATCO decision Long Island Lighting Company filed a motion requesting the Supreme Court to amend its judgment to require the Court of Appeals for the Third Circuit to retain jurisdiction "to enable it to direct the payment of any refunds which may become payable." In reliance on *Montana-Dakota Utilities Co.* v. *Northwestern Pub. Serv. Co.*, 341 U.S. 246 (1951), Long Island noted that the Commission lacked power to order refunds "except pursuant to further order of the Court of Appeals". The Supreme Court denied this motion.

[6] ODECO sought judicial review of this March 7, 1962, order. By order issued September 20, 1963 the Court of Appeals for the Fifth Circuit dismissed ODECO's Petition for Review "without prejudice to the rights of Petitioner to attack the validity of the orders herein involved in petition to review if timely and properly filed, the orders of July 17, 1963 in the Commission's Opinion No. 398."

proceedings from the Southern Louisiana Area Rate Proceeding; and consolidating them for hearing with other producer certificates (R. 410).

A hearing was conducted before a Presiding Examiner who issued his decision on December 7, 1962 (R. 491). Appeals to the Commission were filed by various parties. On July 17, 1963, the Commission issued Opinion No. 398[7] in which it reduced ODECO's price to 20.0¢ per Mcf, including tax reimbursement and adopted the Presiding Examiner's decision that refunds were required with seven per cent interest on all amounts collected in excess of the conditioned price from the date of initial delivery. This would result in ODECO having to refund 3.55¢ per Mcf for gas delivered for approximately four and one-half years although it had no notice of any refund obligation prior to January 10, 1962.

ODECO filed its Petition for Review in the Court of Appeals for the Fifth Circuit on October 23, 1963, alleging several errors made by the Commission. On August 14, 1964, the Court of Appeals for the Fifth Circuit issued its opinion[8] in which it found that the Commission erred in excluding cost and economic evidence; that the Commission erred in imposing a price moratorium on ODECO's permanent certificates; that the Commission could condition the "take or pay" clauses in ODECO's contracts upon a future decision in a rulemaking docket; and that the Commission had authority to require retroactive refunds but that the Commission must first make a just and reasonable rate

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[7] 30 FPC 283 (1963)

[8] Seven other producers filed petitions for review in the Fifth Circuit. Pursuant to procedures agreed upon by the Commission, producer counsel and the Court, the various petitions were consolidated for oral argument, briefing schedules and preparation of the record.

determination under Section 4(e) of the Natural Gas Act in order to determine the amount of the refund. In view of its other holdings the Court did not discuss the questions raised by ODECO as to the validity of the Commission's "in-line" price determination or the requirement that interest be paid on the amounts refunded.

REASONS FOR GRANTING THE WRIT

1. The holding of the Court below that the Federal Power Commission has authority to require retroactive refunds is in conflict with this Court's decisions in *Montana-Dakota Utilities Co.* v. *Northwestern Pub. Serv. Co.*, 341 U.S. 246 (1951); *FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591 (1944); *T.I.M.E.* v. *United States*, 359 U.S. 464 (1959); and the Fourth Circuit's opinion in *Hope Natural Gas Co.* v. *FPC*, 134 F. 2d 287 (4th Cir. 1943).

The Court below succinctly stated ODECO's principal objection to the refund order of the Commission with the following language:

> "The third, and serious, attack made by all is that the operative effect of the refund is that of a reparation order.[52] Under the structure of the Act, it has long been recognized, and never questioned, that '* * * under the Act the Commission has no power to make reparation orders. And its power to fix rates admittedly is limited to those 'to be thereafter observed and enforced.' FPC v. Hope Natural Gas Co., 1944, 320 U.S. 591, 618, 64 S. Ct. 281, 88 L. Ed. 333.[53]
>
> "53. Montana-Dakota Util. Co. v. Northwestern Pub. Serv. Co., 1951, 341 U.S. 246, 71 S. Ct. 692, 95 L. Ed. 912; Panhandle Eastern Pipe Line Co. v. FPC, 3 Cir., 1956, 236 F. 2d 289, 292. The Supreme Court in T.I.M.E. v. United States, 1959, 359 U.S. 464, 469-70, 79 S. Ct. 904, 3 L. Ed. 2d 952, has recently said of *Montana-Dakota*: 'It was held that the Federal Pow-

> er Act, which like the Motor Carrier Act expressly declares unreasonable rates to be 'unlawful', does not create a cause of action for the recovery of allegedly unreasonable past rates * * *."[9]

The Court then ignored the above cited Supreme Court cases which it accepted without qualification and reached a decision directly contrary to these cases by finding that the Commission could order retroactive refunds.

The original Commission order of August 9, 1959 issued ODECO unconditional permanent certificates of public convenience and necessity authorizing the subject sales (R. 116-141). ODECO filed its contracts as rate schedules with the Commission and shortly thereafter commenced deliveries. The only authority that ODECO had to commence deliveries or to continue to make sales of natural gas were the unconditional permanent certificates and rate schedules which were not altered until the Commission's final order in Opinion No. 398. The price provided for in the rate schedules filed with the Commission was the only price which ODECO could legally charge and that Hope was authorized to pay.[10] In Opinion No. 398 the Commission reduced ODECO's contract prices and purported to apply the reduced price retroactively to the date of first deliveries.

Congress could have provided that the Federal Power Commission would have the power and authority to review past rates and award reparations. However, there is no indication that Congress intended that the Commission should have such unusual power. The holding of the Court below that the Commission has the power to award retro-

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[9] Appendix B, p. 27a-28a.

[10] *CAB* v. *Delta Airlines, Inc.*, 367 U.S. 316 (1961).

active refunds is directly contrary to the holding of the Fourth Circuit[11] as expressed in the following language:

> ". . . *The Natural Gas Act* shows clearly that it was the intention of Congress to give the Commission quasi-legislative power, i.e. regulatory power as to future rates; but there is no indication of any intention to clothe it with judicial or quasi-judicial powers with respect to past charges or practices, such as was vested in the Interstate Commerce Commission by section 9 of the Interstate Commerce Act. . . . As the Commission itself says, it was not given authority to fix rates for the past or to award reparations on account of past rates. If it was not given the power to fix past rates, or award reparations based upon their unreasonableness, it certainly was given no power to do the same thing indirectly by making findings of fact as to past rates to be given effect in rate proceedings before state commissions. No intention on the part of Congress to vest any such unusual power in a Commission ought to be indulged unless conferred in the plainest terms; and not only is it not plainly given here, but such power cannot be spelled out of the statutes on any theory of interpretation with which we are familiar." (Emphasis added)

2. The conflict between the cases cited above and the decision of the Court below is readily apparent. Resolution of this conflict is extremely important to the natural gas industry because it raises a basic underlying question which goes to the heart of government regulation of business. When can the regulated industry rely upon certificates issued by the regulatory authority prescribing the conditions under which they may operate? The factual background of this case illuminates the problem.

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[11] *Hope Natural Gas Co.* v. *FPC*, 134 F. 2d 287, 310 (4th Cir. 1943), *rev'd on other grounds* 320 U.S. 591 (1944).

As previously stated ODECO received authority to make the sale to Hope on August 9, 1959 and commenced deliveries shortly thereafter. New York appealed the decision granting the certificates and the order was reversed and remanded for further proceedings by the District of Columbia Circuit Court of Appeals on December 8, 1960. It was not until January 10, 1962, that the Commission warned ODECO that it would grant such refunds as it considered necessary. However, it was not until the final order in Opinion No. 398 that refunds were ordered.

New York did not seek a stay of the original order granting the certificates either from the Commission or the Court. Since courts on review of administrative orders do not attempt to determine rates, the Court's action in reversing and remanding the proceedings did not alter the rate being collected. Further, since ODECO was delivering gas in interstate commerce pursuant to authority granted by the Commission, it could not stop deliveries without Commission approval to abandon the sale as required by Section 7(b) of the Natural Gas Act.[12]

The gas producer, like other businesses, must pay Federal income taxes, predict a cash flow, borrow money, pay expenses, meet payrolls, and unlike other businesses, pay royalty owners and reinvest funds in further exploration and development activities. As a practical matter, if the producer cannot rely upon the only authority which he has from the Commission[13] because the order granting the authority may be or is being appealed or because the Commission may later decide that it was originally in error, then the uncertainties of regulation present an insurmount-

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[12] 15 U.S.C. 717f(b).

[13] Of course after proper notice and hearing the Commission may make changes *prospectively*.

able barrier to prudent management of business. This problem is not confined to the peculiar facts of this case because the Commission has now embarked on procedure whereby they are ordering retroactive refunds of amounts collected under unconditional temporary certificates and there are literally thousands of these certificates outstanding.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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November 20, 1964.

APPENDIX A

Pertinent provisions of the Natural Gas Act of June 21, 1938, c. 556, 52 Stat. 821, as amended by Act Feb. 7, 1942, c. 49, 56 Stat. 83, 15 U. S. C. 717-717w:

SECTION 7(c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: * * * In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commision may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest. [56 Stat. 83; 15 U. S. C. § 717f (c)].

* * * * * *

SECTION 7(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the oper-

ation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extend authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such resaonable terms and conditions as the public convenience and necessity may require. [56 Stat. 83; 15 U. S. C. § 717f (e)].

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 20872

CALLERY PROPERTIES, INC., *Petitioner,*

v.

FEDERAL POWER COMMISSION, *Respondent.*

No. 20885

THE SUPERIOR OIL COMPANY, *Petitioner,*

v.

FEDERAL POWER COMMISSION, *Respondent.*

No. 20890

CAROLINE HUNT SANDS and LOYD B. SANDS, *Petitioners,*

v.

FEDERAL POWER COMMISSION, *Respondent.*

No. 20891

PLACID OIL COMPANY, *Petitioner,*

v.

FEDERAL POWER COMMISSION, *Respondent.*

No. 20892

MARGARET HUNT HILL, TRUSTEE FOR HASSIE HUNT TRUST, *Petitioner,*

v.

FEDERAL POWER COMMISSION, *Respondent.*

No. 20967

J. RAY MCDERMOTT & CO., INC., *Petitioner,*

v.

FEDERAL POWER COMMISSION, *Respondent.*

No. 20989

OCEAN DRILLING & EXPLORATION COMPANY, *Petitioner,*

v.

FEDERAL POWER COMMISSION, *Respondent.*

No. 21028

J. R. FRANKEL, ET AL., *Petitioners,*

v.

FEDERAL POWER COMMISSION, *Respondent.*

Petitions for Review of Orders of the Federal Power Commission.

(August 14, 1964.)

Before RIVES and BROWN, Circuit Judges, and GROOMS, District Judge.

BROWN, Circuit Judge: These cases present important questions under the Natural Gas Act, 15 USCA § 717. These include the nature of the hearing and the scope of the pertinent evidence bearing on price in a § 7 application for permanent certificate, the legality of retroactive rate refund, and the validity of a moratorium on post-certificate § 4 price increases.

The cases are not new for us, certainly not, as to one case. Their presence here bears out the prediction of the dissenter[1] that "this case will be back several years and thousands of pages later."[2] Without assaying the balance of the dissenter's prophesy that "no one will know more than is known now," it is ironic that we hold that we do not know enough because the Commission declined to receive and evaluate important evidence. Thus, in their fifth year, these applications must now go back to have the kind of hearing which we, and other Courts of Appeals, directed.

I.

These are all fallout from Catco[3] in which the Supreme Court reversed the unconditioned certificate because the 21.4¢ price was "out of line."

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[1] United Gas Improvement Co. v. FPC, 5 Cir., 1961, 290 F. 2d 133, 138, 147 (dissenting opinion).

[2] The certificate of the records shows that some of these ran as high as 10,000 pages, others 5,000 and 6,000. Counsel, with the responsible concern demonstrated by Federal Power practitioners, public and private, have reduced it to 617 printed pages under our special FPC practice which became the forerunner of our amended Rules 23 and 24. See Hunt v. FPC, 5 Cir., 1962, 306 F. 2d 334, 336, n. 1. The 17 briefs exceed 480 additional pages.

[3] Atlantic Refining Company v. Public Service Commission of New York, 1959, 360 U.S. 378, 79 S. Ct. 1246, 3 L. Ed. 2d 1312.

Within a short time after affirmance by the Third Circuit on August 4, 1959, of the *Transco-Seaboard* case,[4] the FPC in 6 separate formal hearings involving a total of 69 producer applications issued unconditioned certificates for South Louisiana (and offshore) sales at initial contract prices ranging from 21.4¢ per Mcf where no tax reimbursement was due to 23.8¢ including tax reimbursement. But within 4 months, the Third Circuit's *Transco-Seaboard* decision was summarily reversed.[5] On appeals taken by various distributor-intervenors, the grant of the certificates was reversed by this Court and Courts of Appeals for the Third, Ninth, Tenth, and D.C. Circuits.[6]

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[4] United Gas Improvement Co. v. FPC, 3 Cir., 1959, 269 F. 2d 865.

[5] Sub. nom. Public Service Commission of New York v. FPC, December 14, 1959, 361 U.S. 195, 80 S. Ct. 292, 4 L. Ed. 2d 237.

[6] The original Commission opinions, and the court reversals are as follows (present petitioners shown in parentheses):

(1) Transcontinental Gas Pipe Line Co., Op. 315, 1958, 20 FPC, 264, aff'd sub nom. United Gas Improvement Co. v. FPC, 3 Cir., 1959, 269 F. 2d 865, reversed mem. sub nom. Public Service Comm'n of New York v. FPC, 1959, 361 U.S. 195, 80 S. Ct. 292, 4 L. Ed. 2d 237 (Placid in No. 20891, Hill in No. 20892, and Frankel in No. 21028).

(2) Texas Gas Transmission Corp., Op. 327, 1959, 22 FPC 378, reversed, Public Service Comm'n of New York v. FPC, D.C. Cir., 1960, 287 F. 2d 146, cert. denied, 1961, 365 U.S. 880, 882, 81 S. Ct. 1030, 1031, 6 L. Ed. 2d 192 (Callery in No. 20872, Sands in No. 20890, McDermott in No. 20967, and Ocean Drilling in No. 20989).

(3) California Co., 1959, 22 FPC 252, reversed, United Gas Improvement Co. v. FPC, 9 Cir., 1960, 283 F. 2d 817, cert. denied, 1961, 365 U.S. 879, 881, 81 S. Ct. 1030, 6 L. Ed. 2d 191, 192 (Superior in No. 20885).

(4) Sun Oil Co., 1959, 22 FPC 351, reversed, United Gas Improvement Co. v. FPC, 5 Cir., 1961, 290 F. 2d 133, cert. denied, 1961, 368 U.S. 823, 82 S. Ct. 41, 7 L. Ed. 2d 27.

(5) Sunray Mid-Continent Oil Co., 1959, 22 FPC 361, reversed, United Gas Improvement Co. v. FPC, 10 Cir., 1961, 287 F. 2d 159.

(6) Superior Oil Co., 1959, 22 FPC 369, reversed, United Gas Improvement Co. v. FPC, 5 Cir., 1961, 290 F. 2d 147, cert. denied, 1961, 366 U.S. 965, 81 S. Ct. 1926, 6 L. Ed. 2d 1255 (Superior in No. 20885).

On May 10, 1961, the FPC consolidated the remanded proceedings with the Southern Louisiana area rate proceeding.[7] On January 10, 1963, the FPC denied motions of some intervenor-distributors for security on possible rate refunds. Expressing the view that it has "power to redetermine these proceedings on the basis of the respective records as originally made and in the light of additional facts of which we may take official notice" without further hearing, the Commission nevertheless determined to "adhere to the view that it would be fair and wiser in the present circumstances to offer the applicants a further opportunity to adduce evidence in docket numbers AR61-2 et al. in support of their proposed prices." But it ordered that rate collections "shall be subject to such refund provisions as the Commission may lawfully prescribe by its final order * * * to the extent, if any, that the rate which has been collected exceeds the rate ultimately found to accord with the requirements of the public convenience and necessity."[8] In overruling the petitions for rehearing, the FPC on March 7, 1962, severed the proceedings from AR61-2 and then "consolidated [them] for the limited purpose of determining the public interest, initial price, or prices, applicable to these pro-

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[7] Docket No. AR61-2, 26 Fed. Reg. 4296 (1961).

The area pricing was initiated by Statement of General Policy No. 61-1, issued September 28, 1960. 24 FPC 818 (1960); 18 C.F.R. § 2.56 (1961). By the First Amendment to Statement of General Policy No. 61-1, issued October 25, 1960, the FPC fixed an area price level of 21.5¢ per Mcf plus tax reimbursement. 25 Fed. Reg. 10,488 (1960). Subsequently, by the Fourth Amendment to Statement of General Policy No. 61-1, issued October 23, 1961, the FPC reduced the area price level for initial sales of gas from South Louisiana to 21.25¢ per Mcf, inclusive of tax reimbursement. 26 Fed. Reg. 10,342 (1961).

[8] Superior (our Case No. 20885 — see Items (3), (6), note 6, supra, was not a party to this order.

ceedings."[9] In this order of March 7, 1962, the FPC noted that six weeks earlier, in the remanded Catco dockets, it had found the in-line level in south Louisiana to be 18.5¢ per Mcf, plus 1.5¢ tax reimbursement where applicable. Rejecting contentions by intervenor-distributors that a like finding should peremptorily be entered in these proceedings, the Commission nonetheless concluded that it "should afford the producers further opportunity to be heard."

The hearings thus scheduled were held before an Examiner June 18-21, 1962. At the outset of the hearing, the producers sought to introduce what the Examiner described as "a tremendous mass of cost-type, economic and financial evidence." This cost-of-service evidence followed generally the pattern used by the Commission in prior determinations. Broadly speaking it demonstrated that on a cost-of-service basis the cost to the producers was considerably in excess of the contract price sought to be certificated in the pending applications. Other evidence bore upon the minimum financial requirements for finding and producing gas. These also used techniques and methods employed by the Commission in determining analogous minimum financial requirements. Other evidence showed the demand and supply situation existing both nationwide and in South Louisiana. Some was detailed, indicating that the demand for gas is increasing far in excess of the annual addition of gas supply. Other evidence tied this directly into the exploration for, and finding of, new gas supplies to meet the increased demands, the relation of field prices to those efforts, the impact of lowered prices on exploratory activity, and the

[9] Petitions to review the refund-warning order of January 10, 1962, were dismissed by us "without prejudice to the rights of petitioner to attack the validity of the orders * * * in petitions to review, * * * the orders of July 17, 1963, in the Commission's Opinion No. 398."

like. Other evidence showed the nationwide increase in the current cost of new gas supply over the pre-Catco prices, the increase in the weighted average contract price in this period in relation to drilling and exploratory costs, and refutation of the assertion that contract prices in South Louisiana have leaped from plateau to plateau. We need not describe in any greater detail since in affirming the Examiner's rejection of the evidence, the Commission characterized it as "economic and financial evidence" including that relating to "an individual company or on an area-wide basis" without regard to whether it was "the type characterized as cost-of-service studies, cash flow studies, demand-supply, cost, profit and market price trends, area cost-revenue trends, comparative well cost data and gas replacement costs * * *."

On the motion of the intervenor-distributor supported by Commission staff, the Examiner rejected all of this evidence. In his decision of December 7, 1962, he (1) concluded that the in-line price for the pending sales was 18.5¢ per Mcf plus 1.5¢ per Mcf tax reimbursement where applicable, (2) directed that the producers refund, with interest, all amounts previously collected in excess of the in-line levels of 18.5¢ and 20.0¢.[10] Accepting in the main all of the Examiner's findings and conclusions, the FPC by opinion 398, issued July 17, 1963, took these actions. It unanimously sustained the exclusion of producer cost data, and the finding that the in-line price was 18.5¢. By a 4-1 vote it approved the refunds.[11] In addition, the

[10] The Examiner rejected a number of contentions of Staff and intervenor distributors, one of the Staff being that "excess" payments made to the producers under "take-or-pay" provisions for gas not delivered should be refunded.

[11] Refunds by Superior for collections under one temporary certificate prior to August 10, 1959, were excused based on the FPC's decision Skelly Oil Co. Op. 362, 1962, 28 FPC 401, subsequently reversed in Public Service Commission of New York v. FPC, D.C. Cir., 1964, 329 F. 2d 242.

Commission—on the basis of a finding that rate filings to levels in excess of 23.55¢ per Mcf would cause widespread triggering throughout Southern Louisiana — imposed a moratorium on filings in excess of 23.55¢ until July 1, 1967, or until the conclusion of the pending Southern Louisiana AR61-2 proceeding, whichever is earlier.[12]

Petitions for review have been filed by the producers (see note 6, *supra*). The questions presented for our decision are these. (1) Did the Commission err in excluding the proffered cost and economic data evidence? (2) Did the Commission err in imposing a moratorium on price increases in a permanent certificate? (3) Did the Commission err in ordering refunds of the amounts previously collected? (4) Did the Commission err in fixing the in-line price at the 18.5¢ level? (5) Did the Commission err as to take-or-pay refund provisions? (6) Did the Commission err in making the refund order applicable to Frankel and Placid's Docket No. 13184?

II.

Exclusion of Cost Evidence

We think that a proper consideration of the Act and its elucidation in Catco demonstrates that the Commission erred in rejecting the proffered evidence on cost and other economic data. No doubt Catco is significant and binding, and we accept it without any effort to whittle it down. But the simple fact remains that it is a statute which we are expounding, and the statute does not refer to, much less speak of "in-line" price. To be sure, whether

[12] The FPC rejected Staff's contentions on refund of take-or-pay prepayments, but it conditioned the certificates upon the ultimate outcome of a pending rule-making proceeding, R-199, review of which was recently held to be premature by the D.C. Cir., 1964, 229 F. 2d 242, 248.

a proposed price is in-line or not is an important, sometime decisive, factor. But it is a factor to be weighed along with others in determining whether the proposed sale of gas in interstate commerce "is or will be required by the present or future public convenience and necessity."[13]

In the Commission Catco proceeding the Commission presumably reasoning that a post-certification § 5 rate hearing would afford ample protection against improvident prices, declined altogether to consider the reasonableness of the proposed price or its relation to public convenience and necessity. This approach seemed to find some basis in the structure of the Act in which the statutory provisions concerning rates were found in §§ 4[14] and

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[13] Section 7(e), 52 Stat. 824, as amended, 56 Stat. 84, 15 USCA § 717f(e) provides:

"* * * [a] certificate shall be issued to any qualified applicant therefor authorizing the whole or any part of the operation, sale, service * * * covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of * * * the Act and the requirements, rules and regulations of the Commission thereunder, and that the proposed service, sale, operation * * * to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require."

[14] 15 USCA § 717c.

"4(a) All rates and charges made, demanded, or received by any natural-gas company for * * * the transportation or sale of natural gas * * * shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

"* * *

"(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission * * * schedules showing all rates and charges for any transportation or sale * * * together with all contracts

5[15] and not in § 7 which dealt with the initial application for certification, temporary or permanent. This argument acquired some operational support from the magnitude of the administrative problems, both in time and manageability, of turning every § 7 application into a full blown rate hearing to determine whether the proposed rate was "just and reasonable."

The Supreme Court in Catco forcibly rejected this approach of the Commission. The Court made clear that price was indeed important. It recognized, or course, that "the Act does not require a determination of just and reasonable rates in a §7 proceeding * * * " or "that a 'just and reasonable' rate hearing is a prerequisite to the issuance of producer certificates." And the Court pointed out that it was the delay in processing § 5 proceedings that "requires a most careful scrutiny and

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which in any manner affect or relate to such rates, charges, classifications and services.

"(d) Unless the Commission otherwise orders, no change shall be made * * * in any such rate * * * except after 30 days' notice to the Commission and to the public * * *.

"(e) Whenever any such new schedule is filed the Commission shall have authority * * * to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing * * * may suspend the operation of such schedule * * * but not for a longer period than five months. * * * Where increased rates or charges are thus made effective, the Commission may * * * require the natural-gas company to furnish a bond * * * to refund, with interest, the portion of such increased rates or charges * * * found not justified. * * *."

[15] 15 USCA § 717d.

"5(a). Whenever the Commission, after a hearing * * * shall find that any rate, charge * * * collected by any natural-gas company * * * is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge * * * practice or contract to be thereafter observed and enforced and shall fix the same by order: * * *; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates."

responsible reaction to initial price proposals of producers under § 7." But the Court immediately tied price to public convenience and necessity by requiring that the price "proposal must be supported by evidence showing their necessity to 'the present or future public convenience and necessity' before permanent certificates are issued." The recent increase in the price levels, the Court went on, "does make price a consideration of prime importance" and "where the application on * * * presentation of evidence signals the existence of a situation that probably would not be in the public interest, a permanent certificate should not be issued." After stressing "public convenience and necessity" not less than six times in the space of two paragraphs, 360 U.S. 378, at 390-91, the Supreme Court for the first time articulates the "in-line" concept: "Where the proposed price is not in keeping with the public interest because it is out of line or because its approval might result in a triggering of general price rises or an increase in the applicant's existing rates by reason of 'favored nation' clauses or otherwise, the Commission in the exercise of its discretion might attach such conditions as it believes necessary." 360 U.S. 378, at 391.

The Court stressed that by certificate conditions under § 7, "the consuming public may be protected while the justness and reasonableness of the price fixed by the parties is being determined under other sections of the Act. Section 7 procedures in such situations thus act to hold the line awaiting adjudication of a just and reasonable rate." 360 U.S. 378, at 392. Of unusual importance here was the Court's statement in the analysis of the deficiencies of that record in which "no effort was made to give the 'reason why' * * * the proposed price was some 70% higher that the weighted average cost of 'existing gas to the purchaser.'"

As though Catco began and ended with "in-line" the Commission and the intervenor-distributors are mesmerized by this catch phrase into supposing that the Commission's responsibility is discharged with that limited inquiry and if unsatisfied on that score, it is free to reject out of hand a producer's application for a new service. Catco did not so hold, and this approach ignores the plain terms of the statute which are no way diminished by Catco. Vast as is the discretion of the Commission, the statute, § 7(e), footnote 13, *supra*, accords positive rights to natural gas producers desiring to sell gas in interstate commerce. A producer does not, of course, have an absolute right to engage in the sale. It does, however, subject to compliance with reasonable procedural rules and requirements of the Commission[16] have an absolute right to a consideration of the application by the Commission and the right to have it granted "if it is found that the applicant is able and willing properly to do the acts and to perform the service * * * and the * * * sale * * * is or will be required by the * * * public convenience and necessity." The Commission does not, therefore, fulfill its statutory duty by the limited inquiry into whether the price is "in-line." Conversely, it has no power to deny the application solely on the ground that the price is not "in-line." To be sure, if the proposed price is not "in-line," this may become the dominant factor in denying the application. But it must be done as a part of the larger element of "public convenience and necessity." The Court makes this clear in *FPC* v. *Transcontinental Gas Pipe Line Corp.*, 1960, 365 U.S. 1, 8, 17, 22, 81 S. Ct. 435, 5 L. Ed. 2d 377: "In fact in interpreting this very section we said that 'Sec. 7(e) requires

[16] FPC v. Texaco, Inc., 1964, ... U.S. ....., ... S. Ct. ....., 12 L. Ed. 2d 112.

the Commission to evaluate all factors bearing on the public interest' * * *." Later, the Court states, "In this connection, it must be realized that the Commission's powers under Section 7 are, by definition limited. * * * The Commission cannot order a natural gas company to sell gas to users that it favors; it can only exercise a veto power over proposed transportation and it can only do this when a balance of all the circumstances weighs against certification."[17]

In the concept of public convenience and necessity, price is, of course, very important. But it is not the whole thing. And certainly under a statutory scheme for a utility-type of regulation for the sale, not of a service, but of a depletable commodity,[18] where the Commission serves primarily as a rate-reviewing, not a rate-fixing agency,[19] and in which the entry into the regulated market is the

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[17] Rejecting the Respondent's claim that the Commission had used its power to prevent a levering upward of field prices to bar direct sales of gas, it said: "Certainly such action would be contrary to our previous statements that the term 'public convenience and necessity, connotes a flexible balancing process, in the course of which all the factors are weighed prior to final determination. United States v. Detroit & Cleveland Navigation Co., supra.[19] * * * as the Commission stated, 'countervailing factors suffice to tip the balance against the grant of the authority requested by Transco.' "

Footnote 19 reads: "19. Compare the cases which have held that it was error for the Commission to refuse to consider certain factors within its power of notice. E.g., City of Pittsburgh v. Federal Power Commission, 99 U.S. App. D.C. 113, 237 F. 2d 741."

[18] Chief Judge Tuttle has pointed out: "This is concededly a difficult standard to specify especially in light of the fact that producers are in reality selling gas which they own and are not, in the traditional sense, primarily furnishing a service to the public." Gulf Oil Corp. v. FPC, 5 Cir., 1958, 255 F. 2d 556, 557.

[19] United Gas Pipeline Co. v. Mobile Gas Service Corp., 1956, 350 U.S. 332, 76 S. Ct. 373, 100 L. Ed. 373.

voluntary act of the gas producer,[20] it is perfectly evident that many factors other than price alone bear upon public convenience and necessity and, in turn, upon price.

One of the most critical factors is, of course, the extent and nature of the demand. We decline to believe that the FPC can be oblivious to what all others know firsthand of occurrences since 1956-57, the era that begat the so-called Catco "in-line" price. Population is increasing at explosive rates particularly in metropolitan areas in the South, Southwest and West Coast. What are, for example, the insatiable energy requirements of this ever-expanding population and industrial complex? If the demand is present, the next decisive question is, what about the supply? Can it reasonably be met by the gas now under dedication? Where and from what sources can the demand reasonably be satisfied? And whether this does, or does not, bring about price increases, the decisive question then becomes what price will it take to get the needed gas? The latter question, of course, sets in train a whole series of subsidiary inquiries. This is so because even under a system of voluntary initial dedication of gas, the acceptable price may not be measured by the intransigent demand of a producer. Inherent reasonableness in terms, say, of the likelihood that the needed supply of gas will be obtainable from others by exploration and new production and other similar questions would remain. Other factors could be named.[21] The important thing is that price is not the sole criteria.

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[20] FPC v. Hunt, 1964, ... U.S. ....., ... S. Ct. ....., 11 L. Ed. 2d 878, 883.

[21] Several factors were mentioned just this term in FPC v. Hunt, 1964, ... U.S. ....., ... S. Ct. ....., 11 L. Ed. 2d 878. The Court there concluded that the purpose as revealed by the legislative history was to give the FPC "an opportunity to scrutinize the financial setup, the adequacy of the gas reserves, the feasibility and adequacy of the proposed services, and the characteristics of the rate structure."

A price-only approach does more than substitute for the statutory standard of "public convenience and necessity" a rigid, mechanical arithmetical guide. It is conveivable that such a test could imperil the public interest by foreclosing needed gas from the interstate market solely because the price is out of line. The so-called "in-line" concept necessarily involves a question of time—here in the neighborhood of 1956-57 prior to the contaminating influence of the initial Catco contract. It involves also a selection of so-called comparables and a rejection of those which are either "too high," or are thought to be so, or are otherwise "suspect."[22] Essential as it is that the Commission scrutinize carefully apparent price increases, it is inconceivable that Congress meant to freeze the rates to 1956-1958,[23] or to any other particular time for that matter.[24]

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[22] See Morris, Recent Independent Producer Certificate Cases: The "Suspect Order" Rule, 32 Geo. Wash. Law Rev. 489 (1964); Amerada Petroleum Corp., Op. No. 422, 1964, ... FPC ..... [Nos. CI62-1544, March 23, 1964].

[23] The 18.5¢ per Mcf price fixed here was the figure previously determined to be appropriate in the remanded Catco case, 1962, 27 FPC 96. This line was actually a 1956 level.

> The Commission forecasts that the area proceedings will result in just and reasonable rates. But it recognizes that "[to hold the line] does not mean that irrespective of evidence to the contrary an absolute price freeze is to be imposed until some future date when area proceedings ultimately establish 'just and reasonable' rates."

In re Amerada Petroleum Corp., Op. 422, 1964, ... FPC ....., ... [Docket No. CI62-1544, March 23, 1964].

[24] Indeed, the very nature of present and future public convenience and necessity forbids a look-back to 1956-57 only. The inquiry must include the time of the award. FCC v. Pottsville Broadcasting Co., 1940, 309 U.S. 134, 145, 60 S. Ct. 437, 84 L. Ed. 656; Easton Publishing Co. v. FCC, D.C. Cir., 1950, 185 F. 2d 987, 991.

Rather, the public interest is protected by requiring the Commission to consider price in terms of the whole public convenience and necessity. Indeed, this was recognized by the Ninth Circuit in one of the very cases precipitating the remands now under review.[25] That Court rejected as being "without merit" the "contention that the price line must necessarily accord with the pre-Catco line." The Court went on, "we agree with the view expressed by the Commission in Texas Gas Transmission Corp. et al, 22 FPC 378, 388, that factors such as increased production costs since CATCO, comparative accessibility of field locations and comparative depth of sands tend to make pre-CATCO prices irrelevant for comparative purposes in other cases." *United Gas Improvement Co.* v. *FPC,* 9 Cir., 1960, 283 F. 2d 817, 823. Earlier that Court stated that "* * * the Commission properly refers to circumstances under which an unconditional and permanent certificate might be issued notwithstanding the fact that the proposed price is out of line." 283 F. 2d 817, 821.

And this same theme was echoed by each of the other remanding Courts. "It is conceivable" said the Tenth Circuit, "that in some circumstances public convenience and necessity may require certificating of a sale when the price is 'out of line.'"[26] The D.C. Circuit pointed out alternative courses for the Commission where the "prices * * * are suspiciously higher." One course was to impose interim conditions. As to the other, it offered this solution. "On the other hand, it [the Commission] may grant unconditional certification upon evidence sufficient to 'support a finding of public convenience and

[25] See (3), note 6, supra.

[26] United Gas Improvement Co. v. FPC, 10 Cir., 1961, 287 F. 2d 159, 163.

necessity.'"[27] We spoke in terms of burden making "it * * * clearly incumbent on the proponent of [the proposed] rate to make some showing of the 'reason why' (as it was expressed in the Catco opinion) * * *," the proposed rate was a proper initial rate in view of rates half that high just a few years before.[28]

Evidence of the kind proffered by these petitioners bore upon these questions of public convenience and necessity. That the evidence would, in whole or in part, be pertinent to a § 4 or § 5 "just and reasonable" rate hearing is a matter of no decisive significance. If it proves too much, or proves too little, this is a matter calling for the expert evaluation and judgment of the Commission.[29] We have no fear that with resourceful ingenuity the Commission can develop procedural devices which will keep these § 7 hearings from being bogged down into the full dress § 4 or § 5 rate hearing. Its awesome task calls for great administrative inventiveness which will assure to all, producer, consumer, and public alike, the full measure of statutory rights. *Hill* v. *FPC*, 5

[27] Public Service Commission v. Federal Power Commission, D.C. Cir., 1960, 287 F. 2d 146, 149. The Court then remanded as follows: "The order, insofar as it grants unconditional certification to the initial price proposals of the producer applicants, is reversed and the case is remanded to the Commission for further proceedings in which the producer applicants may, if they so choose, either augment the record so as to support a certification without price condition, or seek certification appropriately conditioned." 287 F. 2d 146, at 150.

[28] United Gas Improvement Co. v. FPC, 5 Cir., 1961, 290 F. 2d 133, 138.

[29] The argument that to receive evidence of this nature is to allow a producer a fair rate of return on excessive costs is a non sequitur. We agree with Judge Wright that "The Commission is not required to subsidize high cost producers with consumers' money." Atlantic Refining Co. v. FPC, D.C. Cir., 1963, 316 F. 2d 677, 680. But whether costs are "too high" or even "high" are comparative factual matters calling for evidence and evaluation.

Cir., 1964, ... F. 2d ....., ..., n. 27 [Nos. 20375, 20386, July 23, 1964].[30]

The task facing the Commission in this developing field calls for innovation and adaptation. It is not, therefore, enough merely to inquire whether the price is "in-line." On the other hand, for § 7 purposes, there need not be a full dress § 4 or § 5 rate hearing. The Commission must, however, hear and evaluate all relevant evidence bearing on public convenience and necessity when it is urged, or held,[31] that the proposed price is out of line.[32]

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[30] Following the Supreme Court's lead in its admonition that the Commission must find ways to expedite proceedings, we there pointed out that much delay flows from an overuse of motions to dismiss instead of an evaluation of evidence for its intrinsic worth in the light of the Commission's expertise. The instant cases graphically illustrate that a motion to strike evidence relating to complex activities is an equally awkward procedural device of limited utility. For all we know, had the Commission received the proffered evidence, it would have held it to be wanting, and that might well have been the end of the matter. Now the case must go back and proceed through lengthy hearings, rehearings, exceptions, arguments before the Commission, rehearings and reargument to receive and evaluate this very evidence. In terms of time and the public interest, the apparent time-saving device of striking this evidence as irrelevant has proved again that the shortest way through is often the longest way around. Determining the utter and irretrievable irrelevance of a large body of evidence under the nuances of a concept as elusive as public convenience and necessity is indeed a summary procedure. And we have many times pointed out that summary procedures "present a treacherous record for deciding issues of far-flung import, on which * * * [Courts] should draw inferences with caution from complicated courses of legislation * * * and practice." Kennedy v. Silas Mason Co., 1948, 334 U.S. 249, 257, 68 S. Ct. 1031, 92 L. Ed. 1347; Chapman v. Hawthorne Flying Service, 5 Cir., 1961, 287 F. 2d 539, 541.

[31] Nothing will keep the Commission from doing this by a two-step proceeding. See Hill v. FPC, supra. Indeed, this Court has recently approved separate trial by separate juries of validity-infringement on the one hand and damages on the other in patent cases. Swofford v. B. & W., Inc., 5 Cir., 1964, ... F. 2d ..... [No. 21024, July 28, 1964].

[32] The evidence relating to cash outflow and replacement cost proffered and rejected in Public Service Commission of New

III.

Price Moratorium

So far as rates are concerned, the Commission did two principal things. First it conditioned the permanent certificate on a reduction of the initial rate to 18.5¢ per Mcf. Second, it found that there was a triggering[33] at 23.55¢ and in order to prevent retriggering, it prohibited the producers from exercising their contract rights to file rate increases above 23.55¢ until the conclusion of AR61-2 or July 1, 1967, whichever is earlier. That moratorium does permit, however, increases from 18.5¢ up to 23.55¢.[34]

Although the Supreme Court stated that the "extent of [the] power [to condition price changes] in permanent certification is not before us now," we think the full import of its recent decision, reversing this Court, *Federal Power Commission* v. *Hunt*, 1964, ... U.S. ....., 84 S. Ct. ....., 11 L. Ed. 2d 858, 886, compels a holding that the Natural Gas Act forbids a moratorium on price increases as a condition to the issuance of a permanent certificate.

Of course the statute gives the Commission the power to attach "such reasonable terms and conditions" to the

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York v. FPC, D.C. Cir., 1964, 329 F. 2d 242, was much more limited than that here. Nor do we regard California Oil Co. v. FPC, 10 Cir., 1963, 315 F. 2d 652 (inquiry as to what the line was); Atlantic Refining Co. v. FPC, D.C. Cir., 1963, 316 F. 2d 677 (question of in-lineness stipulated to be sole issue), as holding contrary to our decision.

[33] Some of the proffered but rejected evidence, see Part II, supra, actually touched on the factual basis, or lack thereof, of the Catco assumption that "new price plateaus will * * * be created." 360 U.S. 378, at 390. We assume, however, that there was a factual basis for the Commission's finding.

[34] The moratorium has a present impact. See, e.g., Superior's contract with United permitting escalation to 23.5¢ plus 2.3¢ tax reimbursement.

issuance of the certificate "as the public convenience and necessity may require." See footnote 13, *supra.* Literally, no distinction is made between temporary and permanent certificates. And undoubtedly there are a number of conditions which lawfully may be attached to the issuance of a permanent certificate.[35] But as the Court did there, when we examine the interplay between § 7 on certification and §§ 4 and 5 on "just and reasonable" rates and rate changes, we think that Congress did not intend that the Commission have the power by a certificate condition to supersede the working of § 4. By § 4 Congress established a statutory scheme in which rates are prescribed and become effective by contractual provision. *United Gas Pipeline Co.* v. *Mobile Gas Service Corp.*, 1956, 350 U.S. 332, 76 S.Ct. 373, 100 L.Ed. 373; *United Gas Pipeline Co.* v. *Memphis Light, Gas & Water Division*, 1958, 358 U.S. 103, 79 S.Ct. 194, 3 L.Ed.2d 153.

There is no real question about the operative process or effect of § 4(e). Subject only to suspension for a limited brief period of time and the obligation to refund on final determination, the rates prescribed in the contract become effective when filed. The only real problem is the point at which the rights of a producer and the powers of the Commission under § 4 become applicable. This the Court answers squarely in *Hunt*. "Under the procedures of the Act, it is at the point of permanent or unconditional temporary certification that the provisions of § 4 become applicable." ..... U.S. ....., ... S. Ct. ....., 11 L. Ed. 2d 878, at 884. It is at that point that "the gas has been permanently certificated into interstate commerce • • • " and, the Court continues, at that point "the independent producer is then free to pursue the rate filing procedure of that section."

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[35] ..... U.S. ....., ... S. Ct. ....., 11 L. Ed. 2d 878, 885, n. 3.

Other parts of the opinion make clear that the critical distinction is between the temporary, conditional certificate, on the one hand, and a permanent certificate on the other. Thus the Court points out, "once a permanent certificate is granted, the Commission can correct an improper rate only under § 5 of the Act * * *." ..... U.S. ....., 11 L. Ed. 2d 878, 883. In view of the necessity for some character of certificate before the gas "can move into interstate commerce" and the statutory right to apply "for temporary authorization" the Court recognizes that " * * * the Commission must have the authority to condition a temporary certificate so as to avoid irreparable injury to affected parties." But, the Court goes on, this " * * * condition, once imposed, continues only during the pendency of the producer's application for a permanent certificate." ..... U.S. ....., 11 L. Ed. 2d 878, 884. And some of the more sweeping statements made in Catco[36] where reference was made to conditional certificates without indication as to permanent or temporary must now be read as conditional *temporary* certificates. For the Court, immediately preceding an extensive quotation from Catco, put its own characterization on the nature of the certificates being dealt with in Catco when it said, "this Court previously discussed the use of the *temporary* certificate procedure in" Catco. (Emphasis supplied.) ..... U.S. ....., 11 L. Ed. 2d 878, 884.

The correctness of our holding is demonstrated by the peculiar facts of this record. For applications filed in 1958,[37] the Commission asserts the power to compel the

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[36] 360 U.S. 378, 79 S. Ct. 1246, 3 L. Ed. 2d 1312.

[37] The Placid and McDermott applications, filed September and December 1958, are typical. There were some as early as April 1957.

producer to sell gas for nearly ten years[38] at a price substantially less than the opening contract price and without the opportunity of being able to ever seek and obtain the automatic stepped up price increases provided for in the contract. Thus, for nearly half of the twenty-year contract period[39] through the guise of a "price" condition, the Commission obtains an irrevocable dedication[40] of the gas to interstate sale and an effectual denial of any opportunity for the producer to exercise the legislative right to file, subject to suspension and refund, contractual rate increases. If the Commission may do it for half of the period, there is no reason why it may not do so for all. Congress could hardly have intended to delegate the power of legislative repeal by any such easy route.

Actually, the Commission's argument for moratorium power harkens back to the like contention made to support exclusion of pertinent economic data discussed in Part II above. Here, as there, it insists that it must have the power to impose a price moratorium because

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[38] The moratorium runs until July 1, 1967, or until any earlier final decision AR61-2. AR61-2 is still going strong. Its earlier counterpart, the Permian Basin hearing, AR61-1, is pending for decision before the Examiner. The briefs inform us that Chairman Swidler has stated that it will be March of 1965 before 61-1 is decided by the Examiner and the end of 1965 before 61-2 is forthcoming. Oil & Gas Journal 62 (March 16, 1964). A minimum of two years more will be required before they grind through Commission review to land in some Court of Appeals for judicial review. See Wisconsin v. FPC, 1963, 373 U.S. 294, 83 S. Ct. 1266, 10 L. Ed. 2d 357; FPC v. Texaco, 1964, ... U.S. ....., 84 S. Ct. ....., 12 L. Ed. 2d 112, 119, n. 13.

[39] Superior's contract with United covering Bayou Penchant and other leases in Terrebonne Parish and the November 1, 1957, contract between Hassie Hunt Trust and Transco appear to be typical.

[40] Since all petitioners have made sales, none is free to withdraw its reserves from dedication. J. M. Huber Corp. v. FPC, 3 Cir., 1956, 236 F. 2d 550.

the alternative is either to force a full blown § 4 or § 5 "just and reasonable" rate hearing, which is an unmanageable administrative problem, or exclude the needed gas from the market until such time as such a hearing can be conducted. But as there, we fail to see that it is a case of either or. If the kind of hearing which the particular facts of a particular application require[41] for determination of "public convenience and necessity," it is to be assumed that the Commission will issue a permanent certificate or if the initial contract price is in line or, if out of line, meets the statutory standard of public convenience and necessity. Full protection to the consumer is thereafter accorded so far as subsequent contract rate increases are concerned under the suspension and refund procedures of § 4(e). If, in that situation, there might be some further triggering impact, then that would flow from the unique statutory scheme which Congress, not the Commission nor the Courts, are free to change no matter how unsound some might think it to be.

The Commission's brief recognizes that it "is true that in *CATCO, Texaco, Inc.* v. *FPC* * * *, *Atlantic Refining Co.* v. *FPC* and *California Oil Co.* v. *FPC* cited by [certain of the petitioners] the Courts assumed that any rate increases contractually permitted could be filed under Section 4 at any time after operations were commenced under a certificate."[42] But it treats these as judicial aberrations

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[41] There are no hard and fast rules. Adaptation is the order of the day in this undulating field. See Hill v. FPC, 5 Cir., 1964, ... F. 2d ..... [Nos. 20375, 20376, July 23, 1964].

[42] Commission Br. 39. The cases referred to are: Catco, 360 U.S. 378; Texaco, Inc. v. FPC, 5 Cir., 1961, 290 F. 2d 149, 156; Atlantic Refining Co. v. FPC, D.C. Cir., 1963, 316 F. 2d 677; California Oil Co. v. FPC, 10 Cir., 1963, 315 F. 2d 652, 660; see also Willmut Gas & Oil Co. v. FPC, D.C. Cir., 1961, 294 F. 2d 245.

resulting presumably from a failure on the part of the Commission "to meet its hold-the-line obligation by a moratorium condition." This leads the Commission's counsel to claim the necessity for, and the existence of, a power to take whatever action, impose whatever conditions to assure that "excessively high prices are absolutely prevented from being charged." But no matter how commendable that policy may be, the Commission may not supersede § 4 to accomplish it.

IV.

Retroactive Refunds

After fixing the initial price at 18.5¢ per Mcf, the Commission in its conditions also required that the producers refund, with interest, the excess over that figure which had been collected under the judicially reversed unconditioned certificates.

The producers make three principal attacks on this refund order. The first one — that the intervenor-distributors should have sought to stay gas deliveries pending determination in the respective Courts of Appeals[43] of their petitions for reviews — has little merit. Quite apart from any problem of whether intervenor-distributors could have met applicable standards for a stay,[44] the producers' plight was not brought about by the failure of the petitioning intervenors to obtain a stay, but came from the action of the producers in making the deliveries under certificates

[43] See note, 6, supra.

[44] The intervenors stress, for example, Virginia Petroleum Jobbers Association v. FPC, D.C. Cir., 1958, 259 F. 2d 921; Eastern Airlines, Inc. v. CAB, 2 Cir., 1958, 261 F. 2d 830; Airport Commission of Forsyth County v. CAB, 4 Cir., 1961, 296 F. 2d 95, 96; Associated Securities Corp. v. SEC, 10 Cir., 1960, 283 F. 2d 773, 774-75; and Armour & Co. v. Freeman, D.C. Cir., 1962, 304 F. 2d 404, 406-08, 418.

which though final, were then under direct judicial attack and subject as any competent Power Commission counsel would know, to the possibility of judicial reversal. The risk inherent in making deliveries pending final judicial determination was obvious to the producers. It was up to them to seek interim protective relief from the Commission, and there is no indication that extensions of time or other appropriate relief would have been declined by the Commission.

In the second attack some petitioners[45] apparently contend that the Commission could not order refunds because the original unconditioned certificates were not "vacated" or "set aside" by the Courts. Other petitioners urge the opposite — no refund right because certificates were "vacated." The wording of the remand orders vary, those of the Ninth Circuit,[46] Tenth Circuit,[47] and this Circuit[48] spoke in terms of "vacating" or "setting aside," whereas those in the D.C. Circuit[49] and the Third Circuit, following the Supreme Court's mandate,[50] spoke in terms of being remanded for further proceedings. But we agree with the Commission that by the choice of one rather than the other terminology, the remanding Courts intended no distinctive difference in effect.[51].

The third, and serious, attack made by all is that the operative effect of the refund is that of a reparation

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[45] See, e.g., No. 20989 (Ocean Drilling), No. 20872 (Callery), and No. 20891 (Placid).

[46] 283 F. 2d 817, at 826.

[47] 287 F. 2d 159, at 163.

[48] 290 F. 2d 133, at 138; 290 F. 2d 147, at 149.

[49] 287 F. 2d 146, at 150.

[50] 361 U.S. 195.

[51] For reasons elucidated in Part II, we reject, however, the further contention of the Commission (Commission Br. 45-47) that "price" was the only issue on the remand.

order.[52] Under the structure of the Act, it has long been recognized, and never questioned, that "* * * under the Act the Commission has no power to make reparation orders. And its power to fix rates admittedly is limited to those 'to be thereafter observed and in force.'" *FPC* v. *Hope Natural Gas Co.*, 1944, 320 U.S. 591, 618, 64 S.Ct. 281, 88 L.Ed. 333.[53]

Although, as we point out shortly, these principles call for a special adaptation in the refund order, we think that the petitioners ignore the unusual circumstances of this case. By the remand orders (note 6, *supra*), all of the Courts of Appeals held that the unconditioned permanent certificates were improperly issued. It is one thing for a Court to rule that under a valid certificate the Commission lacks the power to retrospectively review rates and impose retroactive refund orders. It is quite another for a Court to conclude that a Commission lacking the power to do the former may yet not have inherent power to recapture the fruits obtained under an invalid, that is illegal, order. Thus, under the unique circumstances of this case, refunds are proper.[54]

We have here an unusual situation. On the one hand we hold that producers cannot carry the general prin-

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[52] As we indicated earlier (note 8, supra), Superior was not a party to the refund warning order of January 10, 1962. In our view, the order has no significance one way or the other.

[53] Montana-Dakota Util. Co. v. Northwestern Pub. Serv. Co., 1951, 341 U.S. 246, 71 S. Ct. 692, 95 L. Ed. 912; Panhandle Eastern Pipeline Co. v. FPC, 3 Cir., 1956, 236 F. 2d 289, 292. The Supreme Court in T.I.M.E. v. United States, 1959, 359 U.S. 464, 469-70, 79 S. Ct. 904, 3 L. Ed. 2d 952, has recently said of *Montana-Dakota*: "It was held that the Federal Power Act, which like the Motor Carrier Act expressly declares unreasonable rates to be 'unlawful', does not create a cause of action for the recovery of allegedly unreasonable past rates * * *."

[54] In so holding we do not accept the Commission's argument that it has some general powers to protect public rights similar to that of the NLRB in reinstatement and back pay awards in unfair labor practice cases. The propriety of the refund here stands on the peculiar circumstances of this case.

ciple forbidding reparational orders to the point where it permits them to retain, without question, what was obtained under invalid orders. That means that refunds of excess collections are required. But there is no reason why the producers should, in point of time, be required to refund the difference between the amount collected and the conditioned price as soon as it is determined. Refund at that point is not required to serve any public purpose, or reimburse consumers for excess charges. It may, however, impose irreparable loss to the producers. One public interest is, of course, against triggering. But in these five to six years any triggering effect has already taken place, and its impact has been felt. This clock cannot be turned back. As to consumers, they are ultimately entitled to a refund only to the extent that payments made here exceeded a "just and reasonable" rate.

The problem then is to accommodate what we regard to be the inherent power of the Commission to prevent detriment to the consumers to the needs of this case. To balance the two it means that the refunds for collections made during this long period can be determined only after the "just and reasonable" rate is fixed by an appropriate § 4 or § 5 proceeding.

Indeed, it is the operative impact of the policy against reparations, see note 53, *supra,* which makes this necessary. If the present refund order is affirmed, the producers must repay the difference between the conditioned price and the amount collected. In a § 4 or 5 rate hearing, it may well, however, turn out the "just and reasonable" rate is determined to be higher than the conditioned price.[55]

[55] We agree with the Commission and the intervenor-distributors that in the § 7 proceedings here ordered, the inquiry on public convenience and necessity is not synonymous with determination of "just and reasonable" rate to be fixed under § 4 or § 5. This forces the conclusion that the conditioned price may well be different from the rate ultimately fixed.

But if the refunds have been made, that would be an empty ruling since there would be neither a legal right nor a practicable means for the producers to recapture that portion of the excessive refunds. *Atlantic Seaboard Corp.* v. *FPC*, 4 Cir., 1953, 201 F. 2d 568, 572; *Sohio Petroleum Co.* v. *FPC*, 10 Cir., 1961, 298 F.2d 465, 467. The result, of course, would be that the consumers during the interim would have had gas at a rate less than "just and reasonable." No consumer is entitled under the statute to that. Nothing in the law should encourage that result or its possibility. And for it to occur means more than an undeserved windfall for favored customers. It means that other rate-payers are absorbing this deficiency and are therefore paying more than they should.

Such an approach is all the more required in view of the action which we take in remanding these cases for yet further hearings. Finding, as we do, significant procedural defects, we cannot sustain the conditioned price of 18.5¢. What that price will be, or whether there will be a price condition, must await the outcome of the further hearings. Refunds at the present time would be premature. At the same time this imposes no impossible administrative burden.[56] When and as the Commission on further

[56] If, as the Commission contends, our ruling requires a § 7 hearing bordering on a §4, 5 rate case, there is no reason why the Commission as to these particular cases does not consolidate with the remanded certification proceedings a § 4 or 5 rate case. Consolidation has been ordered before, see, e.g., Texas Eastern Gas & Transmission Co. v. FPC, 5 Cir., 1962, 306 F. 2d 345, 349, cert. denied, 1963, 375 U.S. 941, 84 S. Ct. 347, 11 L. Ed. 2d 273. Where these cases started out with 69 producer applicants, settlements have washed out all except these petitioners. As a precedent, our ruling is something less than the specter supposed, since the Commission, and many others including this Court, look with hope to the day when the area pricing procedure will supply most of the answers. Hunt v. FPC, 5 Cir., 1962, 306 F. 2d 334, 343; Hill v. FPC, 5 Cir., 1964, ... F. 2d ....., ... [Nos. 20375, 20386, July 23, 1964]; Wisconsin v. FPC, 1963, 373 U.S. 294, 83 S. Ct. 1266, 10 L. Ed. 2d 357.

hearings fixes the conditions, it can prescribe the necessary security to assure that the refunds, when ultimately fixed, will be paid and to or through the proper parties.

We agree that refunds can be required.[57] But to meet the exigencies of this unique case, they must be based, not on the conditioned price when fixed, but on the difference between the price collected and the rate found in a proper proceeding to be the "just and reasonable" one.[58]

V.

The "In-Line" Price Established

The petitioners assert that in arriving at the in-line price of 18.5¢, the Commission improperly excluded many higher, finally certificated prices, failed to give proper weight to prices approved by the Commission's own settlements in similar cases, and failed generally to give proper evaluation to the evidence showing contract prices from which to infer the "in-line" price. This, and the petitioner's related contention, that the evidence demonstrated an in-line price not less than the contract price are matters on which we need not express any view. The remand for further hearing to receive all pertinent evidence, see Part

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[57] We think it inappropriate at this time to express any views as to interest or the rate, if interest is to be allowed.

[58] As to Frankel's petition [No. 21028] and Placid's contention as to sales from its well No. 1, Raceland Field, we need only say that, subject to the principles we have discussed as to refunds generally, we agree with the Commission that it is appropriate to require that these producers make whatever refunds are ultimately found to be due for collections made during the time of their respective operations.

As to Superior's petition, except for the Commission allowing a grace period up to August 10, 1959, for sales under one temporary certificate, not here challenged, though similar action was disapproved in Public Service Co. of New York v. FPC, D.C. Cir., 1964, 329 F. 2d 242, 250, there appears to be no substantial difference between this record and the others.

II above, means that these aspects are likewise open for rehearing and redetermination.[59]

VI.

Take-or-Pay Provisions

In accordance with its earlier decision in Skelly, 1962, 28 FPC 401,[60] the Commission ordered that the take-or-pay provisions in the contracts should be subject prospectively to the Commission's future order in a pending rule-making proceeding, Docket No. R-199 with a provision that producers would not be required to file take-or-pay provisions for less than 80% of the annual contract quantities.

Superior alone contends that for gas not delivered there is no sale, and therefore take-or-pay provisions are beyond the jurisdiction of the Commission under the exclusionary language of § 1(b), 15 USCA § 717(b). When viewed realistically in the light of the imperative necessity for long term gas supply commitments, we agree with the Commission that this arrangement constitutes a sale within its power of regulation.

Under the peculiarities of this case with service having long ago been commenced and with no suggestion on the part of anyone that they wish to terminate it, we agree with the D.C. Circuit in its holding that this phase of the order does not presently present a reviewable matter. *Public Service Corp. of New York* v. *FPC*, D.C. Cir., 1964, 329 F. 2d 242, 248; see also *Humble Oil & Refining Co.* v. *FPC*, 5 Cir., 1956, 236 F. 2d 819, cert. denied, 1957, 352 U.S. 967, 77 S. Ct. 354, 1 L. Ed. 2d 321.

The causes are therefore reversed and remanded to the Commission for other and further proceedings consistent with this opinion.

Reversed and Remanded.

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[59] It should be clear that all we say about the "price" itself is equally applicable to the tax reimbursement element.

[60] Public Service Corp. of New York v. FPC, D.C. Cir., 1964, 329 F. 2d 242.

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 20872*

CALLERY PROPERTIES, INC., *Petitioner*,
versus
FEDERAL POWER COMMISSION, *Respondent*.

On Petition to Review Orders of the Federal Power Commission

Before RIVES and BROWN, Circuit Judges, and GROOMS, District Judge.

Judgment

This cause came on to be heard on the petitions of Callery Properties, Inc., The Superior Oil Company, Caroline Hunt Sands and Loyd B. Sands, Placid Oil Company, Margaret Hunt Hill, Trustee for Hassie Hunt Trust, J. Ray McDermott & Co, Inc., Ocean Drilling & Exploration Company, and J. R. Frankel, et al., for review of Orders of the Federal Power Commission issued on July 17, 1963 and September 11, 1963, in Docket Nos. G-13183, et al., and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered, adjudged and decreed by this Court that the Orders of the Federal Power Commission in those causes be and the same are hereby reversed; and that these causes be, and they are hereby remanded to the Commission for other and further proceedings consistent with the opinion of this Court.

August 14, 1964

Issued as Mandate:

* Judgment also entered in Nos. 20885, 20890, 20891, 20892, 20967, 20989, 21028.

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In the Supreme Court of the United States

OCTOBER TERM, 1964

No.

FEDERAL POWER COMMISSION, PETITIONER

v.

CALLERY PROPERTIES, INC., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the Federal Power Commission, prays that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Fifth Circuit entered on August 14, 1964.

OPINION BELOW

The opinion of the Court of Appeals for the Fifth Circuit (U.G.I. Pet. 9a-37a [1]) is reported at 335

[1] "U.G.I. Pet." refers to the petition for a writ of certiorari filed by The United Gas Improvement Company and others in this case. No. 671. Another petition raising the same issues has been filed by the Public Service Commission of New York. No. 678.

F. 2d 1004. The opinions of the Federal Power Commission, Opinions Nos. 398 and 398A, are published at 30 FPC 283 and 682.

JURISDICTION

The judgments of the court of appeals reversing the Commission's order and remanding the proceedings were entered on August 14, 1964 (U.G.I. Pet. 38a-40a [2]). By order of Mr. Justice Black, the time within which the Commission might petition for a writ of certiorari was extended to December 12, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTIONS PRESENTED

1. In determining the initial price at which it will certificate a producer's sale of natural gas under Section 7 of the Natural Gas Act, must the Commission receive and consider the kind of evidence (voluminous economic and financial evidence, including individual-company, areawide, and nationwide studies and data concerning cost of service, cash flow, supply and demand, profit and market price trends, cost-revenue trends, comparative well costs, etc.) some of which would be appropriate in a full-blown rate proceeding?

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[2] Petitions for rehearing filed by J. Ray McDermott Co. (C.A.5 No. 20967), J. R. Frankel, *et al.* (C.A.5 No. 21028), and The Superior Oil Company (C.A.5 No. 20885) were denied on September 22, 1964.

2. May the Commission condition the grant of a permanent certificate to sell gas in interstate commerce upon the applicant's willingness to refrain from filing any rate increase above a specified level during the pendency of area rate proceedings?

3. May the Commission, in granting a permanent certificate to sell gas in interstate commerce at an initial price determined to be in the public interest, require that the applicant refund all charges in excess of that price which were previously collected under an earlier unconditional certificate which had been held illegal on court review?

STATUTES INVOLVED

The pertinent provisions of the Natural Gas Act (Sections 4 and 7(c) and (e), 52 Stat. 821, as amended, 15 U.S.C. 717-717w) are set out in the appendix, *infra*, pp. 16-20.

STATEMENT

In a series of orders issued in 1959, the Commission granted unconditioned certificates of public convenience and necessity authorizing sales by 42 producers of gas in South Louisiana. The contracts, executed in 1957 and 1958, called for initial prices ranging from 21.4 cents to 23.8 cents per Mcf.[3] The

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[3] *Texas Gas Transmission Corp. (Hope Natural Gas Co.)*, Opinion No. 327, 22 FPC 378, 386-389, rehearing denied, 22 FPC 657; *The California Co. (United Gas Pipe Line Co.)*, 22 FPC 252, rehearing denied, 22 FPC 653; *The Superior Oil Co. (Transco)*, 22 FPC 369, rehearing denied, 22 FPC 655;

producers accepted the certificates and, within a short time, commenced deliveries.

Consumer representatives, who had opposed the certificate applications before the Commission on the ground that the proposed contract prices were excessive, sought judicial review of the orders in five courts of appeals. The Third Circuit sustained the Commission's action,[4] but this Court summarily reversed [5] and ordered the case remanded to the Commission for reconsideration in the light of *Atlantic Refining Co.* v. *Public Service Commission of New York* (CATCO), 360 U.S. 378. The other four courts of appeals thereupon reversed similar Commission orders and remanded the proceedings to the Commission.[6]

Sun Oil Co. (United Gas Pipe Line Co.), 22 FPC 351, rehearing denied, 22 FPC 654; and *Sunray Mid-Continent Oil Co. (Transco)*, 22 FPC 361, rehearing denied, 22 FPC 652.

[4] *United Gas Improvement Co.* v. *Federal Power Commission*, 269 F. 2d 865.

[5] *Public Service Commission of New York* v. *Federal Power Commission*, 361 U.S. 195.

[6] *United Gas Improvement Co.* v. *Federal Power Commission*, 283 F. 2d 817 (C.A.9), certiorari denied *sub nom. Superior Oil Co.* v. *United Gas Improvement Co.* and *California Co.* v. *United Gas Improvement Co.*, 365 U.S. 879 and 881; *Public Service Commission of New York* v. *Federal Power Commission*, 287 F. 2d 146 (C.A.D.C.), certiorari denied *sub nom. Hope Natural Gas Co.* v. *Public Service Commission of New York and Shell Oil Co.* v. *Public Service Commission of New York*, 365 U.S. 880 and 882; *United Gas Improvement Co.* v. *Federal Power Commission*, 287 F. 2d 159 (C.A.10); *United Gas Improvement Co.* v. *Federal Power Commission*, 290 F. 2d 133 (C.A.5), certiorari denied *sub nom. Sun Oil Co.* v. *United Gas Improvement Co.*, 368 U.S.

The Commission subsequently instituted an area rate proceeding for South Louisiana and consolidated the remanded cases with that proceeding (R. 376). While denying motions of the consumer intervenors which would have required the producers to post security, the Commission issued an order advising the producers of their potential obligation to refund any amounts collected in excess of those ultimately found to be proper under Section 7 of the Natural Gas Act (R. 395).[7] When it became apparent that decision in the area rate proceeding would necessarily be delayed, the Commission severed this group of applications and set them for hearing in a consolidated proceeding under Section 7 (R. 410).[8] The examiner ruled that the proper standard for determining the initial prices which would serve the public convenience and necessity was the general level of prices un-

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823; and *United Gas Improvement Co.* v. *Federal Power Commission*, 290 F. 2d 147 (C.A.5), certiorari denied *sub nom. Superior Oil Co.* v. *United Gas Improvement Co.*, 366 U.S. 965.

[7] The Courts of Appeals for the Third and Fifth Circuits dismissed as premature petitions to review that advisory order (*Shell Oil Co.* v. *Federal Power Commission*, C.A. 3 No. 14031 (Oct. 2, 1962); *Callery Properties, Inc., et al.* v. *Federal Power Commission*, C.A. 5 Nos. 19563, 19622, 19653, 19663 (Sept. 20, 1963)).

[8] By the time the hearings commenced, many of the cases had been settled, and only 21 of the original 74 dockets remained outstanding. In the course of the hearings, eight additional dockets were settled, leaving only 13, involving nine producers, for decision. One producer accepted the Commission's order and withdrew its petition for review in the court below. *Kilroy Properties, Inc.* v. *Federal Power Commission*, C.A. 5 No. 21029 (Mar. 31, 1963).

der contracts roughly contemporaneous with petitioners' and free of the infirmities which had led the courts to disapprove the original grants of unconditioned certificates. Adopting this standard, he excluded as irrelevant to this issue voluminous cost evidence and other economic data tendered by petitioners which, in his view, would have converted the proceeding into "some 16 different individual producer cost-type cases" (R. 491, 496).

The Examiner concluded that the "in-line" price for sales in South Louisiana under 1957 and 1958 contracts was 18.5 cents per Mcf (plus 1.5 cents reimbursement for the Louisiana gas severance tax where applicable) and ordered refunds of all amounts previously collected in excess of that price (R. 499-509, 515-527).*

The Commission affirmed the examiner (R. 549). Moreover, in order to forestall the filing of rate increases which might trigger "favored nations" clauses in a great many other contracts, the Commission ordered a moratorium on all price increases in excess of 23.55 cents per Mcf (including tax reimbursement) until July 1, 1967, or the final decision in the area rate proceeding, whichever is earlier (R. 574-579).

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* He also decided that the take-or-pay provisions of the sales contracts should be left as they were until completion of a pending rule-making proceeding on the subject (Docket No. R-199, 26 Fed. Reg. 4615, May 26, 1961), at which time petitioners' contracts should be modified to conform to the decision therein, subject to a floor of 80% of the annual minimum quantities called for by the contracts. The court below held this condition not presently reviewable (U.G.I. Pet. 36a-37a) and it is not here in issue.

The court below held that the Commission erred in refusing to consider the economic evidence proffered by the producers. It further held that, in conditioning the issuance of a certificate, the Commission could impose no restriction upon a producer's filing of rate increases. Finally, although it sustained the Commission's authority to order refunds of excessive charges collected under the unconditioned certificate, the court ruled that such refunds are to be measured not by the conditioned initial price ultimately established in the certificate proceeding itself but by a "just and reasonable" rate later to be determined in proceedings under Section 4 or 5 of the Act.

REASONS FOR GRANTING THE WRIT

This case presents two important issues as to the scope and proper exercise of the Commission's power to impose price conditions upon the grant of permanent certificate authority to sell gas in interstate commerce.

The first issue is whether the Commission may rely solely upon an "in-line" determination in fixing the initial price at which it will authorize a sale, or is obliged to receive and consider a voluminous body of cost and other economic evidence offered by the applicant in support of an out-of-line price. The decision below, requiring the Commission to consider such evidence, is squarely in conflict with the recent decision of the Court of Appeals for the District of Columbia Circuit in *Public Service Commission of New York* v. *Federal Power Commission*, 329 F. 2d 242, certiorari

denied *sub nom. Prado Oil & Gas Co.* v. *Federal Power Commission*, 377 U.S. 973.

The second issue is closely related to the question decided last Term in *Federal Power Commission* v. *Hunt*, 376 U.S. 515. There, the Court upheld the Commission's power, in granting a *temporary* certificate, to bar any increase in the initial price pending a hearing on the applicant's petition for permanent authority. The Court noted (at 526) that "the extent of that power in permanent certification is not before us now." The substantial issue not reached in *Hunt* is presented here: whether a permanent certificate may be conditioned upon the applicant's willingness to refrain, for a reasonable time, from filing price increases to a level which, in the Commission's view, would lead to widespread triggering of price-escalation clauses in other gas purchase contracts.

The third question presented, while perhaps not sufficiently important by itself to warrant certiorari, is a recurrent problem that this Court should resolve with the major questions.

1. *The Determination of Initial Price.* While verbally acknowledging the futility of "turning every [Section] 7 application into a full blown rate hearing" (U.G.I. Pet. 18a, 25a), the court below nonetheless held that the Commission was required to receive and consider a mass of data comprising not only the typical cost-of-service presentation which would have sufficed for a "full blown rate hearing," but also detailed economic evidence pertaining to the individual company, to the area, and to the nation as a whole (U.G.I. Pet. 16a-26a). The offer of proof alone, without cross-

examination or rebuttal evidence, covers some 2000 pages of record. Plainly, the Fifth Circuit's ruling would entail a drastic enlargement in the scope of certificate proceedings. In our view, it would increase administrative burdens to the point that the Commission's efforts to bring the producers of natural gas under effective regulation might be significantly impaired. See *Wisconsin* v. *Federal Power Commission*, 373 U.S. 294; *Federal Power Commission* v. *Hunt*, 376 U.S. 515, 527.

This holding, as already noted, is in direct conflict with the decision of the District of Columbia Circuit in *Public Service Commission of New York* v. *Federal Power Commission (Skelly)*,[10] *supra*. In that case, the court of appeals sustained the Commission's action in conditioning certificates of public convenience and necessity upon the acceptance of an "in-line" initial price, and in refusing to consider cost and other economic data relating to factors other than prices for comparable sales. The court explicity held (329 F. 2d at 245) that, under *CATCO*, the Commission's duty in Section 7 proceedings is "to condition certificates by requiring an 'in-line' initial price" and concluded (at 246) that such proceedings—

> * * * permit the Commission to fix the "in-line" price, not on a basis of cash outlay or replacement costs, but on the basis of the price level

[10] This decision is referred to herein as *"Skelly"* to distinguish it from a number of other cases in the courts of appeals bearing the same caption; it sustained the Commission's order in *Skelly Oil Co., et al.*, Opinion Nos. 362 and 362-A, 28 F.P.C. 401 and 1065.

established by comparable sales contracted for by those placing gas in the area in interstate commerce. * * *

It is true, as the court below noted, that the evidence "proffered and rejected in [*Skelly*] was much more limited than that here" (U.G.I. Pet. 18a, fn. 32). The District of Columbia Circuit, however, was not concerned with the weight or sufficiency of the evidence, but with whether such evidence need be considered at all in a Section 7 proceeding.[11] Its conclusion—that such an inquiry would defeat "the purpose of *CATCO* to avoid the consequences of the well nigh interminable proceedings incident to a rate case" (329 F. 2d at 246-247)—applies with even greater force to the similar but more voluminous evidence offered here.[12]

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[11] The initial price established by the Commission in a Section 7 certificate case merely sets the rate which the producer may charge free of refund obligation pending a just and reasonable rate determination pursuant to Section 4(e) or 5(a) of the Act. Within contract limitations and subject to any moratorium on the filing of "triggering" rates (see, *infra*, pp. 11-13), the producers are free to file for rate increases and to collect the increased rates subject to refund at the expiration of the suspension period.

[12] The Commission's rejection of financial and cost evidence purporting to show that the certificated price should exceed the "in-line" price is also in accord with earlier court of appeals decisions. *Texaco, Inc.* v. *Federal Power Commission*, 290 F. 2d 149, 153 (C.A.5); *California Oil Co.* v. *Federal Power Commission*, 315 F. 2d 652 (C.A.10); see also, *Atlantic Refining Co.* v. *Federal Power Commission*, 316 F. 2d 677, 680 (C.A.D.C.).

In short, the issue is important and the conflict unmistakable.

2. *The Price Moratorium.* The court below also held the Commission powerless to impose a limited moratorium upon price increases as a condition of granting a permanent certificate. Without questioning the Commission's findings that 23.5 cents was the potential triggering level, and that to allow respondents any higher price could result in a general breakthrough of the current price ceiling in the area, the court ruled that Section 4 of the Act gives a natural gas company an absolute right to file price increases authorized by private contract—a right which under no circumstances can be impaired by an exercise of the Commission's authority to fix the terms and conditions of certificates. This, we submit, misconceives the relationship between Sections 4 and 7.

In *CATCO,* this Court stated (360 U.S. at 391): "Where the application on its face or on presentation of evidence signals the existence of a situation that probably would not be in the public interest, a permanent certificate should not be issued." We believe, therefore, that the Commission has ample discretion, in applying the standard of public convenience and necessity, to deny a certificate altogether on the ground that escalations authorized by the contract would set off a chain reaction of price increases throughout the area, inconsistent with the protection the Act was intended to afford consumers until reasonable rates can be determined. *A fortiori,* the Commission has the lesser power to grant a certificate

upon condition that the dangerous potentialities of the sale be eliminated.

Section 4 of the Act is no impediment to this conclusion. Section "4(d) is simply a prohibition [against a producer's changing rates without an appropriate filing], not a grant of power." *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332, 339. It carries no implication that the Commission, in the exercise of its Section 7 power to prescribe conditions for the entry of natural gas into interstate commerce, is precluded from placing limitations upon new rate filings where it finds such limitations required by the public convenience and necessity. Indeed, in *Federal Power Commission* v. *Hunt*, 376 U.S. 515, this Court made it clear that "the Commission was given the power [by Section 7 of the Natural Gas Act] to lay down conditions precedent to the entry of the natural gas into interstate commerce" and "[Section] 4 does not come into play until after the initial certification of the natural gas into interstate commerce has been granted under [Section] 7" (at 526, 522). That reasoning, we submit, is applicable to the present case. Moreover, in *Federal Power Commission* v. *Texaco Inc.*, 377 U.S. 33, decided less than a month after *Hunt*, this Court upheld the validity of Commission rules barring the issuance of a certificate for any sale based upon a contract containing an "indefinite" price escalation clause. The decision below, in subordinating Section 7 to Section 4 and denying the Commission's power to condition a producer's entry into the interstate market upon a

limited waiver of his contractual right to file price increases, is inconsistant in principle and reasoning with *Hunt* and *Texaco*.

We submit that the Commission was well within its discretion in concluding that authorization of these sales would be required by the public convenience and necessity only if the producers were willing to abstain from filing price increases above the triggering level until the just and reasonable prices for the sales could be determined in the pending area rate case, or, at the latest, July 1, 1967. Such a moratorium is vital if the price line is to be kept under control pending the completion of the area proceedings.

3. *The Refund Issue.* When the original unconditioned certificates were found defective, the sales were allowed to continue pending the new hearing to fix the proper initial price. Subsequently, in the order under review, the Commission required that respondents refund to their customers any difference between the rates they were charging and the rate found to be the appropriate certificate price. The court below acknowledged the Commission's right to order refunds.[13] It concluded, however, that the proper measure was the amount by which the rates collected under the invalid certificates exceeded the price ultimately determined to be just and reasonable in an appropriate rate proceeding. The court reasoned that the producer should be entitled

[13] One of the producers, Ocean Drilling & Exploration Company, has filed a petition for certiorari to review this ruling. No. 714.

to retain, and consumers required to pay, no less than a just and reasonable price, and that if that price should turn out to be higher than the "in-line" price established in the certificate proceeding, producers who had already made refunds down to the lower "in-line" price would be unable to recapture the excessive reimbursements. That holding, we believe, was erroneous. In our view, a producer who commences service under a permanent certificate later held invalid, or under a temporary certificate issued *ex parte*, should be permitted to collect and retain no higher price than that which he would have received under a properly conditioned permanent certificate. In short, he is entitled to no more than an "in-line" price until such time as a just and reasonable rate is determined.

Since the ruling below is in terms confined to the rather unusual situation in which refunds are ordered because of the invalidation of the original certificate, the issue is not in itself of sufficient importance to warrant the intervention of this Court. However, the court's reasoning casts doubt on the standard of measurement to be applied in the more common case where the producer's obligation stems from its commencement of operations pursuant to temporary authority at a price higher than that subsequently found to be the proper initial price. *Skelly*, *supra* (329 F. 2d at 249-250); cf. *Hunt Oil Co.* v. *Federal Power Commission*, 334 F. 2d 474, 479 (C.A. 5) (involving temporary authorizations issued to replace permanent certificates after judicial remands). In the latter con-

text, the scope of the refund obligation is a recurrent problem.[14]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted.

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December, 1964

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[14] The court of appeals also noticed (U.G.I. Pet. 36a) that respondents challenged the Commission's determination of the "in-line" prices, but it did not reach the point. If certiorari is granted, we shall set forth our reasons for believing that the Commission's method was proper and that no remand on this point is necessary.

APPENDIX

The pertinent provisions of the Natural Gas Act, 52 Stat. 821, as amended, 15 U.S.C. 717-717w, are as follows:

SEC. 4. (a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this Act takes effect) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping upon for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, State commission, or gas distributing company, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with

reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

Sec. 7(c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however,*

That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on the effective date of this amendatory Act, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after the effective date of this amendatory Act. Pending the determination of any such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however*, That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest.

Sec. 7(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the opera-

tion, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

Nos. [redacted], 21, 22, 32

THE UNITED GAS IMPROVEMENT COMPANY, LONG ISLAND LIGHTING COMPANY, AND PHILADELPHIA ELECTRIC COMPANY, PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, FEDERAL POWER COMMISSION,

Petitioners,

v.

CALLERY PROPERTIES, INC., J. R. FRANKEL, MARGARET HUNT HILL, TRUSTEE, J. RAY McDERMOTT & CO., INC., OCEAN DRILLING & EXPLORATION COMPANY, PLACID OIL CO., CAROLINE HUNT SANDS AND LOYD B. SANDS, AND THE SUPERIOR OIL COMPANY,

Respondents.

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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In The

Supreme Court of the United States

October Term, 1964

Nos. 671, 678 & 756

The United Gas Improvement Company, Long Island Lighting Company, and Philadelphia Electric Company, Public Service Commission of The State of New York, Federal Power Commission,

Petitioners,

v.

Callery Properties, Inc., J. R. Frankel, Margaret Hunt Hill, Trustee, J. Ray McDermott & Co., Inc., Ocean Drilling & Exploration Company, Placid Oil Co., Caroline Hunt Sands and Loyd B. Sands, and The Superior Oil Company,

Respondents.

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

CITATION TO OPINIONS BELOW

The opinion and judgment of the Court of Appeals for the Fifth Circuit are reported at 335 F. 2d 1004 and the opinion is attached as Appendix B to Ocean Drilling & Exploration Company's (ODECO's) Petition for Writ of Certiorari in No. 714.

JURISDICTION

The judgment of the Court of Appeals was entered on August 14, 1964. Jurisdiction of this court is invoked under 28 U.S.C., § 1254(1). By order dated December 9, 1964, the time within which ODECO was to file its reply to the Petitions for Writ of Certiorari filed by the Petitioners was extended to January 11, 1965.

QUESTIONS PRESENTED

1. Whether, in certificate proceedings under § 7 of the Natural Gas Act, the Federal Power Commission may refuse to admit and consider probative cost and economic evidence adduced by producers in support of their initial contract prices.

2. Whether the Commission under § 7 of the Natural Gas Act may issue a permanent certificate of public convenience and necessity with a condition attached forbidding the producer from filing contractually authorized rate increases pursuant to § 4 of the National Gas Act.

3. Assuming that the Federal Power Commission has authority under § 7(e) of the Natural Gas Act to require producers to refund amounts previously collected pursuant to unconditional permanent certificates, is the Commission required to exercise such authority without considering the equities, the applicable just and reasonable price and any other pertinent factors?

STATUTES INVOLVED

This case involves primarily § 7(c) and 7(e) of the Natural Gas Act, 15 U.S.C., § 717f(c) and 717f(e). These sections of the Act are set out in Appendix A attached to ODECO's Petition for a Writ of Certiorari in No. 714.

STATEMENT

ODECO has filed a Petition for Writ of Certiorari in No. 714 asking that certiorari be granted with respect to the holding of the court below that the Commission has authority to require "retroactive refunds" of amounts previously collected under ODECO's unconditional permanent certificates and filed rate schedules. The Federal Power Commission has filed a Petition for Writ of Certiorari in No. 756 asking that certiorari be granted with respect to the holdings of the court below (1) that relevant cost and economic evidence must be admitted and considered in a § 7 certificate proceeding, (2) that the Commission may not impose a price moratorium on permanent certificates forbidding the filing of contractually authorized rate increases pursuant to § 4 of the Natural Gas Act, and, (3) that under the unique circumstances of this case refunds of amounts previously collected by ODECO in excess of any valid price condition imposed by the Commission cannot automatically be required but "can be determined only after the 'just and reasonable' rate is fixed by an appropriate § 4 or § 5 proceeding." 335 F. 2d at 1019. Likewise, the Public Service Commission of the State of New York in No. 678 and the United Gas Improvement Company, Long Island Lighting Company and Philadelphia Electric Company[1] in No. 671 are seeking certiorari on substantially the same questions presented in the Federal Power Commission's petition.

This memorandum brief is filed in response to the Petitions for Writs of Certiorari filed by the Federal Power Commission and the Intervenors in Nos. 671, 678 and 756.

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[1] Hereafter referred to collectively as Intervenors.

Since six Petitions for Writ of Certiorari[2] complaining about various portions of the judgment below have been filed, each with a statement of the history of these proceedings, this brief will not restate the background of this controversy. Reference is made to ODECO's petition in No. 714 as accurately portraying the history of the proceedings culminating in the decision below. Therefore, the comments below will be directed to certain facets of the present controversy which do not appear in any of the other petitions.

ODECO sought review of the Commission's imposition of four principal conditions on the permanent certificates issued to it by the orders under review; i.e., FPC Opinion Nos. 398 and 398-A. The four certificate conditions to which ODECO objected were the reduction in the initial contract price from 21.5¢ per Mcf, plus tax reimbursement of 2.05¢ per Mcf, to an initial price of 18.5¢ per Mcf, plus tax reimbursement of 1.5¢ per Mcf; the moratorium on the filing of price increases; the requirement that ODECO refund the difference between its initial contract price and the price condition imposed by the Commission, plus interest; and the condition making the take-or-pay-for clauses in ODECO's

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[2] Eight separate petitions for review seeking the reversal of the Commission's orders in Opinions No. 398 and 398-A were filed in the Court of Appeals for the Fifth Circuit by producer certificate applicants; namely, Callery Properties, Inc. (No. 20,872), J. R. Frankel (No. 21,028), Margaret Hunt Hill, Trustee (No. 20,892), J. Ray McDermott & Co., Inc. (No. 20,967), Ocean Drilling & Exploration Company (No. 20,989), Placid Oil Company (No. 20891), Caroline Hunt Sands and Lloyd B. Sands (No. 20,890), and The Superior Oil Company (No. 20,885). The Public Service Commission of the State of New York, the United Gas Improvement Company, Long Island Lighting Company and Philalelphia Electric Company intervened in the proceedings in the court below in support of the Commission's orders. The Petitioners in Nos. 671, 678 and 756 have named all of the producers as Respondents. J. R. Frankel and J. Ray McDermott & Co., Inc., have filed a Petition for Writ of Certiorari in No. 769. The Superior Oil Company has filed a Petition for Writ of Certiorari in No. 776 and the Respondent ODECO has filed a Petition for Writ of Certiorari in No. 714.

contracts subject to a future order in a pending rule-making proceeding. With regard to the initial price condition, ODECO complained that the Commission committed serious error in determining the so-called "in-line" price because it arbitrarily and without justification disregarded all prices above 18.5¢ per Mcf.[3] In fact, ODECO devoted seven pages in its brief below to the errors committed by the Commission in determining the "in-line" price and, pursuant to agreement among the producers, ODECO's counsel in oral argument before the court below explained the errors in the Commission's "in-line" price determination. Of course, ODECO also complained of the Commission's error in excluding all cost and financial evidence.[4]

The court below agreed with ODECO's position, that all cost and economic evidence should not have been excluded. However, the court below then stated that, in view of its holding that the cost and economic evidence should not have been excluded, it did not reach the question of the errors in the "in-line" price determination.

The Fifth Circuit further stated that the "in-line" price aspects were open for rehearing and redetermination when

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[3] ODECO's objections were directed to the Commission's determination of an 18.5¢ per Mcf base price and to its determination of a tax reimbursement allowance of 1.5¢ per Mcf.

[4] ODECO recognizes the right of the Commission to make a proper "in-line" price determination as one of the evidentiary criteria to be considered in determining whether ODECO's proposed initial contract price is consistent with the present and future public convenience and necessity. However, it is ODECO's position that such an "in-line" price determination is not the *sine qua non* of a producer certificate case, and if the Commission should determine that ODECO's contract price is not "in-line", then the Commission was required to receive and consider the proffered cost and economic evidence to determine if such evidence provided the necessary further justification to support unconditional certification.

the case returned to the Commission for a proper hearing, 335 F. 2d at 1021. It is unfortunate that the court did not reach the question of the errors in the Commission's "in-line" method since a complete understanding of the serious error committed by the Commission in excluding all cost and economic evidence cannot be reached by simply examining the abstract question of the admission of evidence. It is also necessary to examine what the basis for the decision is without the excluded evidence. The Commission by a footnote in its Petition (fn. 14, p. 15) states that if certiorari is granted it will set forth reasons for believing that the Commission's method of determining the "in-line" price was proper and that no remand on this point is necessary. However, the fact remains that the Court did not reach the question, so that ODECO and the Commission were not aggrieved by the court's holding on this point, and thus no error was presented which could be the proper basis for a Petition for Writ of Certiorari. If certiorari is granted and the Court should reverse the decision below on any or all of the questions presented by the Commission and Intervenors, the case would then have to be remanded to the court below to review the substantial error in the Commission's "in-line" price determination.[5]

ODECO, in the court below, also alleged that the Commission committed error in requiring interest on the amount of refunds that were ordered. Once again, since the court below found that the Commission improperly ordered refunds, it did not "express any views as to interest or the rate, if interest is to be allowed." 335 F. 2d at 1020, fn. 57.

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[5] Including the errors alleged in its determination of the base price and tax reimbursement.

ARGUMENT

The Court Below Properly Held That Cost-Type, Economic and Financial, Cost-of-Service, and Supply and Demand Evidence, Both on An Individual and An Area-Wide Basis was Admissible In a Section 7 Producer Certificate Case.

1. The court below pointed out, "These are all fallout from *CATCO* in which the Supreme Court reversed the unconditional certificate because the 21.4¢ price was 'out-of-line' "[5a] and then noted, (335 F. 2d at 1012):

> "As though Catco began and ended with 'in-line', the Commission and the intervenor-distributors are mesmerized by this catch phrase into supposing that the Commission's responsibility is discharged with that limited inquiry and if unsatisfied on that score, it is free to reject out of hand a producer's application for a new service."

This Court characterized the record in *CATCO*[5b] as containing little more information than was included in the printed contracts and expressed surprise that evidence, if available, was not introduced as to the relative costs of production from adjoining submerged areas. The fatal defect in *CATCO* was the lack of sufficient evidence to support the Commission's unconditional certification of the producers' initial prices.

Following this same rationale the Court of Appeals for the District of Columbia remanded FPC Opinion No. 327 in which the Commission had permanently certificated the subject sales by ODECO at the initial contract price of 21.5¢ per Mcf plus tax reimbursement of 2.05¢ per Mcf. *Public*

[5a] 335 F. 2d at 1007.
[5b] *Atlantic Ref. Co.* v. *Public Serv. Comm'n*, 360 U.S. 378 (1959).

Serv. Comm'n v. *FPC*, 287 F. 2d 146 (D.C. Cir. 1960) *cert. denied* 365 U.S. 880 (1961). The court pointed out that, "The *Catco* decision does not prescribe the standard of proof which must be satisfied to support an unconditional certification" 287 F. 2d at 150. However, the court expressly rejected the Commission's sole reliance on "numerous other certified sales in the area" and held that ODECO's proposed initial prices fell "within the *Catco* rule, and hence cannot be unconditionally certificated by the Commission without the supporting evidence which that case requires". 287 F. 2d 149. The court of appeals then remanded the case for "further proceedings in which the producer applicants may, if they choose, either augment the record so as to support certification without price condition, or seek a certification appropriately conditioned." 287 F. 2d at 150.

At the hearings after remand ODECO sought to introduce evidence to explain the "reason why" its initial price of 21.5¢ per Mcf was justified but such evidence was summarily rejected. Thus, through this appeal the "wheel has come full circle".[6] This Court's *CATCO* decision reversed Commission certification of sales of natural gas from Southern Louisiana because the record evidence was inadequate to support the proposed initial prices. The D. C. Circuit reversed the original unconditional certification of ODECO's sales for the same reason. However, on remand the Commission disregarded the holding in *CATCO* and the mandate of the D. C. Circuit and relied exclusively on "other certified sales in the area" to support its price condition. Now this Court is once again faced with a record that contains little more information than that contained in the printed contracts. The only difference is that in *CATCO* the producers were supporting the Commission's

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[6] *King Lear*, Act V, Scene 3, Shakespeare.

decision at a 21.4¢[7] level by reference to other certificated prices. Now the "shoe is on the other foot", and on the basis of the same type of evidence the intervenors are supporting the Commission's record at an 18.5¢ per Mcf level. After five long years and thousands of dollars of expense, it became the duty of the court below to order the Commission, as the D. C. Circuit did in 1960, to hold a proper hearing for consideration of the supporting evidence required by *CATCO*.

2. The basic argument of the Commission and the Intervenors in support of granting certiorari is that if the Commission must allow any evidence into the record in a producer certificate case other than that contained in the printed contracts, an administrative monstrosity will result and that, therefore, for administrative convenience all such evidence should be excluded. Despite the self-serving declarations by the Commission in some of its opinions, this simply is not so. The Commission admitted the type of evidence in dispute in the proceedings underlying Opinion No. 351,[8] in Opinion No. 362[9] and in Opinion No. 399.[10] The evidence was received and thoroughly cross-examined without creating a "monstrosity".

The Commission and the Intervenors would have this Court believe that the separate certificate application of each producer would create a "full blown" rate case if cost and economic evidence were admitted. But this is not what

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[7] The sales involved in *CATCO* were from offshore leases and not subject to State of Louisiana taxes. Therefore, no tax reimbursement was applicable.

[8] 27 FPC 96 (1962). This is the decision of the Commission in the *CATCO* case after remand by this Court.

[9] 28 FPC 401 (1962). This decision resulted in *Public Serv. Com'n.* v. *FPC*, 329 F. 2d 242 (D.C. Cir. 1964) *cert. denied sub. nom. Prado Oil & Gas Co.* v. *FPC*, 377 U.S. 963.

[10] 30 FPC 329 (1963).

happens in a typical Section 7 proceeding. For example, the instant case began with sixty-nine certificate applications of which there are only twelve left contesting the Commission's decision. The remainder have been settled or the producers have accepted the prices given to them by the Commission. Under current Commission procedure, there are typically between sixty and eighty applications from a contiguous geographical area set for hearing at the same time in a consolidated proceeding.[10a] Out of this number there are usually not more than a dozen producer counsel in any one hearing. The majority of the evidence is presented on a joint basis by the producers i.e., the producers all support the same witness. The producers are not in favor of expensive and protracted hearings. It costs thousands of dollars to make these presentations and most of the small producers simply cannot afford to participate in such hearings and must take the price offered by the Commission. The group that is burdened most by having evidence other than that contained in the printed contract admitted are the producers for they have the burden of proof in a Section 7 proceeding and typically, most of the evidence in the proceeding is prepared and paid for and presented by the producers.

3. To a limited degree all of the petitions filed by the Commission and Intervenors, but particularly the petition in No. 678 filed by New York, attempt to leave the impression that the producers can have the rejected evidence heard and cross examined in the area rate proceedings currently in progress, so that upholding the Commission's position that the evidence should not be admitted in a § 7 proceeding would not result in the producers' never "having their day in court." Nothing could be further from the truth. *All* cost

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[10a] There are even fewer certificate *applicants* involved because, as in the present case, one producer will have several certificate *applications* consolidated in the same hearing.

and economic evidence relating to individual producers is being systematically excluded by the Examiner in the Southern Louisiana Area Rate Proceeding, and was excluded by the Examiner in the Permian Basin Area Rate Proceeding. Therefore, if not received in certificate proceedings, evidence relating to individual circumstances will never be heard in any proceeding before the Commission, so that the Commission will never know whether the price which it sets in a § 7 or § 4 proceeding is adequate to meet a particular individual producer's financial requirements.

4. The Commission and the Intervenors rely upon an alleged conflict between the D. C. Circuit's decision in *Public Serv. Comm'n* v. *FPC*, 329 F. 2d 242 (D.C. Cir., 1964), *cert. denied sub nom., Prado Oil & Gas Co.* v. *FPC*, 377 U.S. 963 and the decision below. No such conflict exists. It should be noted that in *Skelly* the limited cost evidence was received and cross examined and actually considered by the Commission, whereas in the present case the cost and economic evidence was excluded from the outset and never tested by cross examination. Thus, the statements of the court in *Skelly* as to the admissibility of such evidence were obviously dictum and not essential to the court's ultimate holding in that case. By contrast, the principal holding of the court below is that "a proper consideration of the Act and its elucidation in *Catco* demonstrates that the Commission erred in rejecting the proffered evidence on cost and other economic data." 335 F. 2d at 1010.

Another crucial difference is that *Skelly* involved a question of the weight to be given evidence received in the record and cross examined, whereas the present case is concerned with the threshold question of whether cost and economic evidence is admissible in a § 7 certificate proceeding. In *Skelly* the D. C. Circuit was careful to state it was not holding that "the Commission may never consider such

evidence if the circumstances in a particular case move it to do so consistently with its obligation under *Catco.*" 329 F. 2d 247. ODECO submits that the unique circumstances of this case, as recognized throughout the opinion of the court below, clearly justify — in fact require — the admission and consideration of the proffered cost and economic evidence. Finally, the court below evidently did not believe there was any conflict for it cited *Skelly* in its decision without attempting to discuss or distinguish the dictum in *Skelly* as to the Commission's failure to give sufficient weight to the cost evidence in that case. In summary, the decision below is correct and consistent with *CATCO,* and since no conflict exists certiorari on the evidence question should be denied.

The Court Below Properly Held that the Imposition of a Price Increase Moratorium Was Improper.

5. The court below construed this Court's opinion in *FPC* v. *Hunt,* 376 U.S. 515, (1964), as compelling the holding that the Natural Gas Act forbids a moratorium on contractually authorized price increases as a condition to the issuance of a *permanent* certificate. ODECO submits that since this Court has already decided the moratorium issue during the last term in the *Hunt* decision and since the Petitioners are unable to distinguish that case certiorari should be denied.

6. The court below disposed of the price moratorium issue by simply referring to this Court's *Hunt* decision and therefore found it unnecessary to discuss the further reason why the Commission improperly imposed a price moratorium on the certificates granted to the producers. In the court below ODECO contended that there was not one single shred of evidence in the record to support the imposition of a price increase moratorium. There was no evidence that any triggering of prices would occur if price increases were filed above the 23.55¢ level. None of the witnesses in the hearing discussed the effect of these prices in that range and it never occurred to the producers that the Commission even contemplated the imposition of such an onerous condition. No one in the court below refuted this contention. Thus, assuming *arguendo* that *Hunt* did not forbid the imposition of a price increase moratorium, the decision below should be sustained because in this case such certificate condition is not supported by substantial evidence or soundly based findings in the record.

The Court Below Erroneously Held That the Federal Power Commission Had The Power to Order Retroactive Refunds.

7. There are four conflicting views on the question of whether the Federal Power Commission may order retroactive refunds in a Section 7 certificate proceeding. ODECO takes the position that the Commission is not empowered under the Natural Gas Act to order retroactive refunds of amounts collected pursuant to unconditional *permanent* certificates, particularly under the circumstances of this case, as is more fully discussed in their petition in No. 714.

The Commission and the Intervenors take the position that not only does the Commission have the statutory power to require retroactive refunds in this case, but that refunds are an absolute requirement regardless of the equities, the applicable just and reasonable price, etc. The D. C. Circuit in *Skelly*[11] was confronted with the more typical situation of one price being collected pursuant to unconditional temporary certificates and a lower price condition being imposed at the time of permanent certification. The D. C. Circuit in *Skelly* held that the Commission had the power to order refunds but that the Commission must view the equities involved to determine the amount, if any, which must be refunded by the producers.

The court below did not adopt any of the foregoing positions but held that in the unique circumstances of this case, i.e. the producers collected the prices provided for in their permanent certificates which were later invalidated on appeal, that the Commission had the power to order refunds but that such refunds "can be determined only after the 'just and reasonable' rate is fixed by an appropriate § 4 or § 5 proceeding." 335 F. 2d at 1019. The court reasoned that under the Act the consumers were not entitled to gas at a rate less than a just and reasonable rate and to order refunds without determining the just and reasonable rate could cause an undeserved windfall for favored customers.

8. The Commission and the Intervenors object to the requirement of the court below that refunds can only be determined after the Commission finds the just and reason-

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[11] *Public Serv. Comm'n* v. *FPC*, 329 F. 2d 242 (D.C. Cir. 1964) *cert. denied sub nom. Prado Oil & Gas Co.* v. *FPC*, 377 U.S. 145.

able rate. However, the Commission in its petition has framed the question upon which it asks this Court to grant certiorari in terms of power and authority rather than in terms of "method". Regardless of the wording in the various petitions, there are two distinct questions which this Court is being asked to decide if certiorari is granted. In No. 714 ODECO raises the question of whether the Commission has *authority* under Section 7(e) of the Natural Gas Act to require refunds of amounts previously collected pursuant to its unconditional permanent certificates and filed rate schedules. In Nos. 671, 678 and 756 the Commission and Intervenors assume the existence of such authority and ask whether the court below was correct in determining how this authority should be exercised.

ODECO's petition details the reasons why it believes certiorari should be granted in No. 714 as to the Commission's authority under Section 7(e) of the Act to require retroactive refunds. However, assuming the existence of such power, the granting of certiorari on the question of the manner in which it is to be exercised does not appear to be warranted — particularly in the unique circumstances of this case. Even *Skelly* would not condone the Commission's action in this case in automatically requiring refunds without consideration of the equities, the applicable just and reasonable rate, etc. However, ODECO recognizes that if certiorari is granted with respect to its petition in No. 714 the Court may wish to consider the entire refund question, including both the questions of authority and the manner in which it is to be exercised.

CONCLUSION

For the foregoing reasons, the Petitions for Writs of Certiorari in Nos. 671, 678 and 756 should be denied except insofar as the Court may deem it appropriate to consider the entire refund question.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 671

THE UNITED GAS IMPROVEMENT COMPANY, ET AL., *Petitioners,*

v.

CALLERY PROPERTIES, INC., ET AL., *Respondents.*

No. 678

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, *Petitioner,*

v.

CALLERY PROPERTIES, INC., ET AL., *Respondents.*

No. 756

FEDERAL POWER COMMISSION, *Petitioner,*

v.

CALLERY PROPERTIES, INC., ET AL., *Respondents.*

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR CALLERY PROPERTIES, INC., IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals for the Fifth Circuit (U.G.I. Pet., pp. 9a-37a)[1] is reported at 335 F. 2d 1004.

JURISDICTION

The judgment of the court of appeals reversing the orders of the Federal Power Commission and remanding the proceedings was entered on August 14, 1964 (U.G.I. Pet., pp. 38a-40a). Petitioners would invoke the jurisdiction of the Court to review the judgment below under 28 U.S.C. § 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. § 717r(b).

QUESTIONS PRESENTED

1. Whether the court of appeals was correct in holding that, while the Commission need not convert a producer certificate hearing under Section 7(e) of the Natural Gas Act into a full-blown rate case, the Commission is under a duty to hear and evaluate all relevant evidence bearing on the public convenience and necessity when it is urged, or held, that a producer's proposed price is out of line.

2. Whether the court of appeals was correct in holding that the Commission may not properly condition the grant of a permanent certificate under Section 7 of the Natural Gas Act upon a requirement that the applicant thereafter waive the rate filing pro-

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[1] "U.G.I. Pet." refers to the petition for a writ of certiorari filed by The United Gas Improvement Company, Long Island Lighting Company and Philadelphia Electric Company in No. 671. As hereinafter used, "P.S.C. Pet." and "F.P.C. Pet." refer to the companion petitions filed by the Public Service Commission of New York and the Federal Power Commission in Nos. 678 and 756.

cedures reserved to natural gas companies under Section 4 of the Act.

3. Whether, having held that the Commission had the power to reduce rates retroactively and to order refunds in the unique circumstances of the instant case, the court of appeals was correct in further holding (a) that the producers were entitled to just and reasonable rates under the Natural Gas Act, and (b) that a balancing of the equities required that refunds not be ordered pending a determination of the justness and reasonableness of the contract rates collected by the producers over a period of years under unconditioned permanent certificates.

STATUTE INVOLVED

Pertinent provisions of the Natural Gas Act (Sections 4, 5, 7 and 19(b), 52 Stat. 821, as amended, 15 U.S.C. §§ 717-717w) appear in Appendix A to the petition in No. 671 (U.G.I. Pet., pp. 1a-8a). The provisions of Sections 19(a) and (c) of the Act, as amended, are set forth in the Appendix, *infra*, p. 17.

STATEMENT

Respondent Callery Properties, Inc., is a nominee corporation engaged in the business of selling natural gas and oil produced from various fields in the States of Louisiana and Texas.[2] Since a substantial portion of the gas which it sells as agent for others is resold by pipelines in interstate commerce, Callery is subject to

[2] Callery is one of three related entities engaged in the business of exploring for and developing oil and gas reserves on behalf of individual investor-participants. As nominee and agent for approximately 300 individuals, estates, trusts and corporations for whom it holds record title in producing properties, Callery owns none of the gas which it sells (R. 326-27). It is unique among the other producer respondents in this respect.

regulation by the Federal Power Commission as a "natural-gas company" under the Natural Gas Act.

The case below began for Callery in December 1958 when it filed two applications with the Commission for certificate authority under Section 7 of the Act covering proposed sales of gas to Hope Natural Gas Company from fields in Acadia and Iberia Parishes, Louisiana. The proposed initial price in each case was 21.5 cents per Mcf, plus 2.05 cents per Mcf tax reimbursement. A hearing was held on Callery's applications in conjunction with related pipeline and producer applications, and on August 10, 1959 the Commission issued its Opinion No. 327, 22 F.P.C. 378 (R. 116), granting Callery and other producers proposing sales to Hope permanent unconditioned certificates of public convenience and necessity in accordance with their applications.

The Public Service Commission of New York sought rehearing of Opinion No. 327 and later judicial review on the ground that Callery and the other producers had failed to demonstrate why their sales were required by the public convenience and necessity at prices higher than the 18-cent price "line" contemplated by this Court in *Catco*[3] (R. 144).[4] Basing its decision on *Catco,* the Court of Appeals for the District of Columbia reversed Opinion No. 327 and remanded the

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[3] *Atlantic Refining Co.* v. *Public Service Commission of New York,* 360 U.S. 378 (1959).

[4] While urging that the certificates of the producers be conditioned at a price no higher than that demonstrated by the record to be in the public convenience and necessity, the New York Commission did not seek a stay of the certificate authority granted as it might have done under Section 19(c) of the Act. Being under a dual obligation to the pipeline purchaser and to royalty owners to commence production at the earliest date, Callery began deliveries of gas to Hope in December 1959.

case to the Commission for further proceedings in which the producer applicants might, if they so chose, "either augment the record so as to support a certification without price condition, or seek a certification appropriately conditioned." *Public Service Commission of New York* v. *Federal Power Commission*, 287 F. 2d 146, 150 (D.C. Cir. 1961).

On May 10, 1961 the Commission moved to carry out the judgment of the D.C. Circuit by consolidating the remanded proceedings involving Callery's sales with the area rate proceeding instituted on that date in Docket No. AR61-2 "to determine the rate, or rates, at which the public convenience and necessity requires, and a just and reasonable rate, or rates, for sales of natural gas" in the geographical area defined as Southern Louisiana, 25 F.P.C. 942, 944. Eight months later, without a hearing having been held in either the Southern Louisiana area proceeding or in Callery's remanded dockets, the Commission issued an order on January 10, 1962 advising Callery for the first time that the Commisison might subsequently require as a condition of amended certificate authorization that Callery refund revenues received from Hope Natural Gas Company from the date of first delivery of gas (R. 395).[5] Thereafter, on March 7, 1962, Callery's two

[5] Under its agency agreement with the owners of the gas which it sells, Callery is legally bound to distribute all income when received and may not withhold income from a current owner save in those instances where it has received prior notice of a potential refund liability. Since the ownership in the properties involved had changed radically in the period following the commencement of deliveries of gas to Hope and many of the original owners and recipients of income were no longer available, Callery sought review of the Commission's January 10, 1962 order. Its petition for review was dismissed by the Fifth Circuit without prejudice. *Callery Properties, Inc.* v. *Federal Power Commission*, 5th Cir. No. 19563 (September 20, 1963).

dockets were severed from the Southern Louisiana proceeding and consolidated with other remanded dockets for separate hearing and disposition, 27 F.P.C. 482 (R. 409).

In the hearing that followed, which lasted a total of four days and in the course of which virtually all evidence offered by Callery and the other producers in support of their initial contract prices was excluded as irrelevant, the presiding examiner ruled that the sole criterion for determining the initial price at which the producers' sales would serve the public convenience and necessity was the general price level prevailing in Southern Louisiana in 1957 and 1958 under contracts free from the infirmities which led the courts to reverse the Commission's original unconditional certifications. On December 7, 1962 the examiner issued a decision in which he determined the "in line" price for gas sold in Southern Louisiana under 1957 and 1958 contracts to be 20.0 cents per Mcf, including tax reimbursement of 1.5 cents per Mcf, and ordered Callery and the other producers to refund to their respective purchasers all amounts collected in excess of a base price of 18.5 cents from the date of initial delivery of gas (R. 490).

On July 17, 1963, by Opinion No. 398 and order issued in *Placid Oil Company, et al.*, 30 F.P.C. 283 (R. 549), the Commission affirmed the examiner's decision in all material respects. The examiner's conclusion that economic and cost evidence were irrelevant to the determination of a proper "in line" price was affirmed in particular, as was his finding that the producers be required to refund amounts previously collected under unconditioned permanent certificates. In addition to the other requirements of the examiner's

order, which the producers were given no option to reject, the Commission added a further condition imposing a moratorium on all rate increase filings in excess of 23.55 cents per Mcf, including tax reimbursement, until July 1, 1967, or the final decision in the Southern Louisiana area rate proceeding, whichever is earlier (R. 582).

On review of Opinion No. 398, the court below held that the Commission erred in three respects. The court found first that the Commission had failed in its statutory duty to determine the present and future public convenience and necessity when it restricted the scope of its inquiry in the remanded proceedings to pre-existing prices in Southern Louisiana. While agreeing that the question of whether a producer's proposed price is in line or not is an important and sometimes decisive factor in the certification of his sale, the court held that factors other than price exist which must be taken into consideration and that when, as in this case, it is urged and held that the proposed price is out of line, the Commission is under a duty to hear and evaluate all relevant evidence bearing on the public convenience and necessity.

Secondly, the court held that the moratorium on rate filings, imposed as a condition of permanent certificate authorization, was unlawful and tantamount to the Commission's repeal of a right reserved to natural gas companies by Congress under Section 4(d) of the Act. Finally, while upholding in the unique circumstances of the case the Commisison's power to require refunds, the court held that refunds should not be ordered pending a determination of the justness and reasonableness of the producers' rates under Sections 4 and 5 of the Act.

ARGUMENT

Petitioners assert in terms of important issues warranting review three grounds for the issuance of a writ of certiorari: (1) that the decision of the court below is in conflict with the decision of the D. C. Circuit in *Public Service Commission of New York* v. *Federal Power Commission*, 329 F. 2d 242 (*"Skelly"*), and decisions of other circuits which have held that the Commission may rely exclusively on an 'in line" determination in fixing the initial price at which it will authorize sales by producers; (2) that the court below ruled incorrectly on an important question left open by the Court in *Federal Power Commission* v. *Hunt*, 376 U.S. 515, namely, the power of the Commission to prohibit rate increase filings under Section 4(d) of the Act as a condition of permanent certification under Section 7 of the Act; and (3) that the court below misconceived the distinction between an "in line" price and a just and reasonable rate when it deferred the ordering of refunds in this case pending a determination of the justness and reasonableness of the producers' rates in an appropriate proceeding.

None of the grounds asserted by Petitioners warrants the granting of certiorari. The supposed conflict with *Skelly* is more apparent than real and, despite the efforts of Petitioners to create one, there is no substantial issue relating to the Commisison's conditioning power or the scope of its authority under the Natural Gas Act which has not already been determined by this Court or which was not correctly decided by the court below.

1. *The Exclusion of Evidence.* The first issue raised by Petitioners is succinctly stated by the Commission

(F.P.C. Pet., p. 7) to be whether the Commission may rely solely on an "in line" determination in fixing the initial price at which it will permanently certificate a producer's sale, or whether it is obliged to receive and consider a voluminous body of cost and other economic evidence offered by the applicant in support of an out-of-line price. The decision of the court below, holding that in this case the Commission was required to hear and evaluate evidence of other than a strictly "in line" type, is alleged to be squarely in conflict with the decision of the D.C. Circuit in the *Skelly* case, *supra*. The further contention is made that the court's ruling, if permitted to stand, will seriously impair the Commission's efforts to bring producers under effective regulation.

When the two cases are viewed in proper perspective and context, the claimed conflict between the decision below and the D.C. Circuit's decision in *Skelly* plainly does not exist. Unlike *Skelly* and the other cases relied upon by Petitioners (P.S.C. Pet., pp. 12-14), which involved initial certifications, the case below was unique in that it involved the residuum and by-product of a large number of earlier permanent certifications which had been remanded to the Commission in the light of *Catco, supra,* for the failure of the producers to show the "reason why" their sales were required by the public convenience and necessity at prices which would otherwise be considered out of line. By the time the Commission issued its decision in the remanded proceedings on July 17, 1963, most of the producers' sales were ancient history in the sense that known changes in the national economy had occurred in the period following their initial certifica-

tion.[6] Under the circumstances, consistent with its duty under Section 7(e) of the Act to determine the "present or future" and not the past public convenience and necessity, the Commission was required on remand to re-examine and evaluate all aspects of the producers' sales, including the initial price issue, in light of current conditions in the industry. *United Gas Improvement Co.* v. *Federal Power Commission*, 283 F. 2d 817, 823 (9th Cir. 1960).

The Fifth Circuit's ruling that it do so in this case and that it not limit its inquiry solely to the "in line" price in prior years was nowise inconsistent or in conflict with the D.C. Circuit's endorsement of the Commission's "in line" determination in *Skelly* where, as the Commission itself acknowledges (F.P.C. Pet., p. 10), the evidence proffered and rejected was of a much more limited nature. Moreover, while holding in *Skelly* that consideration of the proffered evidence was not essential to the Commission's decision in that case, the court was careful to point out that:

> "* * * In so deciding we need not hold that the Commission may never consider such evidence if the circumstances in a particular case move it to do so consistently with its obligations under *Catco*." (329 F. 2d at 247).

Bearing in mind that it was the Commission's failure to carry out its obligations under *Catco* that prompted the same panel of the D.C. Circuit to reverse and remand Opinion No. 327 for further proceedings to per-

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[6] This fact alone would explain why the Commission chose initially to consolidate Respondents' remanded proceedings with the Southern Louisiana area rate proceeding in Docket No. AR61-2. Nothing in the Fifth Circuit's decision would preclude the Commission from following that course today.

mit the producers either to "augment the record" or to seek "appropriately conditioned" certificates (287 F. 2d 146, 150), it is illogical to assume that any real conflict exists between the court's subsequent decision in *Skelly* and the holding below. In remanding Opinion No. 327 to the Commission with instructions to "augment the record," the D.C. Circuit obviously contemplated a hearing in which the producers would be afforded the opportunity of showing by substantial evidence the "reason why" their sales were required at the prices proposed in their contracts. Such a showing was obviously impossible when the Commission summarily excluded as irrelevant all evidence other than that relating to previously certificated prices in Southern Louisiana.

Petitioners all express the fear that the holding below will hereafter turn every producer certificate case under Section 7 into a "full blown rate case." They unanimously predict that, if allowed to stand, the Fifth Circuit's decision will open the floodgates overnight to a veritable deluge of cost and economic data more appropriate to a rate proceeding under Section 4 or 5 of the Act, thereby seriously impairing the Commission's current program for achieving effective producer regulation. Petitioners' fears in this regard are somewhat exaggerated.

In the first place, the vast majority of new gas sales contracts being entered into today are not only in the form prescribed by the Commission's rules but at the prices prescribed for the particular producing area shown in the Commission's Statement of General Policy No. 61-1, 18 C.F.R. § 2.56. Under streamlined certificating procedures now in effect, literally hundreds of new sales have been and are now being per-

manently certificated at the Policy Statement "guideline" prices in record time.[7] In those few cases where the proposed initial price exceeds the Commission's guideline price, or where its urged by an intervenor that the initial price is out of line, the producer may request temporary authorization or accept permanent certification at a lower price. It follows necessarily that in the present climate of producer regulation the number of cases in which the Commission would be required to hear and evaluate evidence proffered by the applicant in support of an out-of-line price would be relatively few.

Beyond that, and more important, the court below did not purport to indicate either the quantum or the nature of the proof required to sustain the certification of a sale at a higher than "in line" or out-of-line initial price. While indicating that the economic and cost evidence excluded by the Commission was clearly relevant in that it bore on broad questions of public convenience and necessity, the court recognized the administrative burden involved and the necessity for expedition in the discharge of the Commission's duties and responsibilities under the Act. The court therefore pointed to a specific, workable solution, which Petitioners have chosen to ignore, *i.e.*, that the Commission avoid the delays which would necessarily attend the trial of a full-dress rate case in a Section 7 certificate case by announcing the types of evidence deemed relevant and the nature of the proof required to support

[7] On February 26, 1964, the Commission announced that during the first 6½ months of experience under its new streamlined procedure for handling independent producer certificate cases it disposed of 806 filings in an average time of 42.3 days for each item, compared with approximately 100 days under the old process. See FPC Press Release No. 13156, issued February 26, 1964.

certification at an initial price deemed or urged to be out of line (U.G.I. Pet., pp. 24a-26a, n31).

Despite the assurance given producers by the Commission in its Statement of General Policy No. 61-1 that: "[w]here a proposed price exceeds the indicated rate level and is therefore conditioned . . . we will, in determining whether the higher price is justified, not necessarily consider only the financial requirements of the individual producer proposing the price but will consider all of the above elements relevant to the industry generally in the area concerned,"[8] the Commission has to date applied no standard other than historical price structure, or the "in line" price concept, where the producer's proposed price is alleged to be out of line. The Commission's final decision in the several area rate proceedings cannot be expected to provide a panacea for the recurrent problem facing the Commission in determining the initial price at which new gas is required by the present and future public convenience and necessity since, as is now the case in Docket No. AR61-2 where just and reasonable rates for the Southern Louisiana area are being determined on 1960 data, the final determination will always be outmoded by the time it is made. It is therefore vital, as the court below held, that the Commission receive and consider all relevant evidence bearing on the public convenience and necessity when it is urged or held that the proposed price is out of line and that the Commission not limit

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[8] The "above elements relevant to the industry generally" were stated to be "cost information from all decided and pending cases, existing and historical price structures, volumes of production, trends in production, price trends in the various areas over a number of years, trends in exploration and development, trends in demand, and the available markets for the gas." (18 C.F.R. § 2.56).

its whole inquiry and determination to a price line having no current relevance.

2. *The Moratorium Issue.* In its decision in *Federal Power Commission* v. *Hunt,* 376 U.S. 515, decided last Term, the Court held that:

> "Under the procedures of the Act, it is at the point of permanent or unconditional temporary certification that the provisions of § 4 become applicable. The gas has been permanently certificated into interstate commerce and the independent producer is then free to pursue the rate filing procedure of that section." (376 U.S. at 523).

While it is true, as Petitioners point out, that the Court did not have before it, and specifically left open, the question of the extent of the Commission's power to condition a permanent certificate of public convenience and necessity (as opposed to temporary authorization) upon the applicant's agreement to waive the right to file for increased rates under Section 4(d) of the Act, we believe the court below was correct in holding that all rights granted and reserved to natural gas companies by Congress under the Act become fully operative at the time of permanent certification.

Were it otherwise, there would be little reason for the Commission to carry its regulation of producers beyond the point of permanent certification since, based on a finding of public convenience and necessity under Section 7(e) of the Act, the Commission could, without more, effectively require that a producer sell his gas at one fixed price and one price only over the entire life of the dedicated reserve, *i.e.,* declare a permanent moratorium at the time of permanent certification.

3. *The Refund Issue.* Based largely on the Court's decision in *Federal Power Commission* v. *Tennessee*

Gas Transmission Co., 371 U.S. 145, and the D.C. Circuit's decision in the *Skelly* case, *supra*, Petitioners contend that the court below, while correctly holding that Callery and the other producers should be required to refund all excess amounts collected under their original certificates, nevertheless erred in misconstruing Sections 7 and 4 of the Act when it held that the producers were entitled to just and reasonable rates under the Natural Gas Act and that the refunds should be deferred pending the outcome of an appropriate proceeding under the rate sections of the Act. There is no merit to Petitioners' contention on this point and little weight to their arguments.

In *Tennessee, supra*, refunds were ordered only *after* a determination under Section 4(e) that the increased rates involved were unjust and unreasonable and, while the Court noted that refunds did not constitute a perfect remedy, it did not suggest that refunds were inappropriate. Nor were refunds ordered in *Skelly*, the court finding in that case that the existence of the power to order restitution did not mean that its exercise was mandatory. In *Skelly*, the court remanded on a finding that "further development and fuller consideration of the equitable factors other than those thought to flow from the mere absence of an explicit refund condition in the temporary certificates." (329 F. 2d at 250). Noting that the producers in this case had sold their gas under unconditioned permanent certificates over a period of years and, further, that the Act requires that all rates "shall be just and reasonable" both to consumers and to natural gas companies, the court below held that a balancing of the equities required a deferral of refunds pending a determination of justness and reasonableness. Callery believes the court below was eminently correct in so holding.

While Callery did not and does not agree with the decision below insofar as it holds that the Commission may order retroactive refunds as a matter of law, Callery is willing to abide a proper determination of the justness and reasonableness of its contract rates in accordance with the court's decision.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petitions for certiorari should be denied on all points and issues raised by Petitioners.

Respectfully submitted,

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January 11, 1965

APPENDIX

Rehearing; Court Review of Orders

SEC. 19(a) Any person, State municipality, or State commission aggrieved by the order issued by the Commission in a proceeding under this act to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b), the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this Act.

* * * * *

SEC. 19(c) The filing of an application for rehearing under subsection (a) shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order. [52 Stat. 831 (1938); 15 U. S. C. § 717r]

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IN THE

Supreme Court of the United States

OCTOBER TERM 1964

No. 756

FEDERAL POWER COMMISSION,

Petitioner,

v.

CALLERY PROPERTIES, INC., ET AL.,

Respondents.

No. 671

THE UNITED GAS IMPROVEMENT COMPANY,
LONG ISLAND LIGHTING COMPANY, and
PHILADELPHIA ELECTRIC COMPANY,

Petitioners,

v.

CALLERY PROPERTIES, INC., ET AL.,

Respondents.

No. 678

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,

Petitioner,

v.

CALLERY PROPERTIES, INC., ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE SUPERIOR OIL COMPANY IN OPPOSITION

The Opinion below, Jurisdiction of the Court, and Statutes involved are sufficiently set forth in one or more of

the above Petitions to which this Reply is addressed. It is felt that a counterstatement of the questions presented will be helpful.

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Is the "in line" price level the only factor to be considered by the Federal Power Commission in determining the requirements of present and future public convenience and necessity in a certificate proceeding under Section 7 of the Natural Gas Act?

2. Must evidence, relevant and material to establish and permit evaluation of factors of present and future public convenience and necessity, and which shows that a price greater than the "in line" price is required by the public interest,[1] be excluded from a certificate hearing because (a) it might extend the hearing time and record made, or (b) such evidence might also be admissible in an individual rate proceeding involving the certificate applicant?

3. Where for more than four (4) years gas has been sold at rates established under unconditional permanent certificate orders, after vacation of such orders may the Commission order refunds with interest of the amounts collected during said years in excess of an "in line" price when it is uncontroverted that the "in line" rates may not be just and reasonable, and the evidence tendered shows that such "in line" prices are confiscatory?

4. Where jurisdictional gas sales have commenced under a permanent unconditioned certificate order and may not be discontinued except by further Commission order under Section 7(b) of the Natural Gas Act, may the Commission

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[1] As pointed out in Petition No. 756, Pg. 15, footnote 14, the Court below did not reach the propriety of the Commission's determination of "in line" price. That issue is not before this Court, but was challenged below.

condition a further permanent certificate, issued after vacation and remand of its prior order, to preclude the applicant from filing for contractually authorized rate changes during the next four (4) years when the rate fixed in the reissued certificate order may not be just and reasonable?

COUNTERSTATEMENT OF THE CASE

The instant proceeding is an administrative monstrosity of the type which the above Petitioners feared would result from the opinion of the Court below. This is a consolidated proceeding resulting from five separate original hearings and decisions by the Commission, each of which included large consolidations (one as many as 69 separate applications) in which separate unconditional permanent certificate orders were issued by the Federal Power Commission (Commission) during 1958 and 1959.[2] Superior was a party in only two of the original separate proceedings[3], certificated by the Commission on August 10, 1959 in separate orders. After separate judicial review of the various Commission orders, the reversal thereof and remand to the Commission, the certificate applications of Superior were consolidated for rehearing after the remand with the other applications; however, because of the separate nature of the original proceedings, a number of the orders applicable to one or more of the present parties had no effect as to others. Thus, the Commission order "advising the producers of their potential obligation to refund" (J. App. 395) mentioned in the Commission's Petition No. 756, Pg. 5, relates only to parties other than Superior.[4]

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[2] Footnote 3, Pg. 6, Petition No. 671, United Gas Improvement Company, et al.

[3] The California Co., 22 FPC 252 (1959), and The Superior Oil Company, 22 FPC 369 (1959).

[4] See Opinion below, 335 F. 2d 1004, 1009 footnote 8.

The order fixing the hearing date after remand provided that the hearing was to be limited to the "public interest initial price" for the various applications but was not to "foreclose any party from presenting evidence which he believes would compel the conclusion that a higher price [than an "in line" price] would be in the public interest" (J. App. 416). At said hearing the Examiner, subsequently affirmed by the Commission, ruled that "the only testimony that we can put in in this case has to do with the price line" (J. App. 201), and thereupon excluded from the record evidence offered to show cost-of-service of Superior, its minimum financial requirements for finding and producing gas nation-wide, and in this area, the existing demand and supply situation, the relation of field prices to exploration for and the finding of gas, and the adverse impact of reduced field prices on exploratory efforts.[5]

Based only on the "price line" testimony admitted into evidence, the Examiner found, and the Commission affirmed, that after eliminating all prices above 18.5¢ per MCF as suspect, the "in line" price in 1958 was 18.5¢ per MCF (J. App. 558). This determination of "in line" price was challenged below, but the issue was not reached as the decision of the Commission was reversed on other grounds, and the issue is not present here.

Having found the "in line" price, the Commission then conditioned reissuance of permanent certificates on refund of all amounts collected in excess of that price under its previous unconditioned orders which had been reversed, forbade the applicants to seek price increases authorized by their respective contracts in excess of 23.55¢ per MCF for nearly four years (to July 1, 1967 or the termination of its South Louisiana Area Rate Proceeding AR61-2, whichever

[5] See Opinion below, 335 F. 2d 1004, 1009.

was earlier), and imposed other conditions and refunds not material to disposition of the above Petitions.

The Court below held that in view of the peculiar circumstances of this case and based on the teachings of this Court in *CATCO*[6] although the initial price and its relation to the existing price line is a prime factor in determining the present or future public convenience and necessity, yet the line price is not the sole factor to be considered in determining the public convenience and necessity, and evidence to justify an out-of-line price is admissible. The Court further held that although the Commission has authority to order reparations by refunds in granting a permanent certificate under the peculiar circumstances here obtaining (the gas having been sold for a number of years under Commission orders which were reversed and the sellers having no option to reject a reissued certificate regardless of conditions contained therein), such refund amount could properly be only the difference between the amounts collected and rates which are found to be just and reasonable. Further, that the obligation to refund, affecting only past rates, should be delayed pending the determination of just and reasonable rates in order to prevent irreparable injury and to do justice to all parties. The Court also held that the Commission could not, by conditions imposed, re-write or eliminate the statutory procedures established by Congress for the changing of rates by a natural gas company.

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[6] *The Atlantic Refining Co.* v. *Public Service Com. of New York* (1959), 360 U.S. 378.

ARGUMENT

We show below that as to the questions raised by the several Petitions here opposed, the decision of the Court below is fully supported by prior decisions of this Court and is not in conflict with decisions of other Courts of Appeals. Thus, there is no real issue here raised as to possible determination of an important question of Federal law that has not been, but should be, decided by this Court.

All Factors of Public Convenience and Necessity Must be Considered

The Court below held that "in line" price is not the only factor to be considered in determining whether the certification of a sale of natural gas is required by present or future public convenience and necessity, and reversed the Commission for its failure and refusal to consider other evidence which would show a "reason why" even an "out-of-line" price might be required in the public interest.

The Court below relied upon and is supported by this Court's *CATCO* decision, *The Atlantic Refining Company* v. *Public Service Com. of New York* (1959), 360 U.S. 378. *CATCO* did not "instruct" the Commission to prevent all "higher priced" gas from ever entering the interstate market regardless of the facts involved. The Court clearly held that gas should not be permitted to enter the interstate market unless required by present or future public convenience and necessity, as to which the initial price is a factor of prime importance in determining such convenience and necessity, but "* * * that rates are [not] the only factor bearing on public convenience and necessity, for Section 7(e) *requires* the Commission to evaluate *all* factors bearing on the public interest." (Pg. 391, emphasis added) Further, that where a proposed initial price is out of line "the Commission in the exercise of its discretion might attach such conditions as it believes necessary" unless the RECORD before the Commission establishes a "reason

why" such higher price is required by the public convenience and necessity. (Pgs. 391 and 393). If there is no "reason why" in the record, then the Section 7(e) conditioning procedure is to be employed.

This specific holding was approved and re-announced with emphasis by Chief Justice Warren in *Federal Power Commission* v. *Transcontinental Gas Pipe Line Corporation* (1961), 365 U.S. 1:

> "In fact in interpreting this very section we said that 'Sec. 7(e) requires the Commission to evaluate *all* factors bearing on the public interest' ****." (Pg. 8)

And:

> "In this connection, it must be realized that the Commission's powers under Section 7 are, by definition, limited. **** The Commission cannot order a natural gas company to sell gas to users that it favors; it can only exercise a veto power over proposed transportation and it can only do this when a balance of *all* the circumstances weighs against certification." (Pg. 17, footnote omitted.)

In the last mentioned case denying Respondent's claim that the Commission had used its power to prevent a levering upward of field prices to bar direct sales of gas, it was said:

> "Certainly such action would be contrary to our previous statements that the term 'public convenience and necessity' connotes a flexible balancing process, in the course of which all the factors are weighed prior to final determination. United States v. Detroit & Cleveland Navigation Co., supra[19] * * * * as the Commission stated, 'countervailing factors suffice to *tip the balance* against the grant of the authority requested by Transco'." (pgs. 23-24) The footnote indicated reads as follows:
>
> "[19] Compare the cases which have held that *it was error for the Commission to refuse to consider certain factors* within its power of notice. E.g., City of Pittsburgh v. Federal Power Commission, 99 U. S. App. D.C. 113, 237 F. 2d 741." (Emphasis added)

Some of the factors which bear upon present and future public convenience and necessity, or public interest, are

pointed to in this Court's recent decision (March 30, 1964) in *Federal Power Commission* v. *H. L. Hunt, et al.*, 376 U.S. 515, 84 S. Ct. 861. There Justice Clark, speaking for the Court, interpreted the present Sections 7(c) and (e) of the Natural Gas Act by making reference to legislative history at the time of the section's amendment in 1942. He stated that the purpose of the amendment[7] was to give "the Commission an opportunity to scrutinize the financial setup, the adequacy of the gas reserves, the feasibility and adequacy of the proposed services, and the characteristics of the rate structure" of the proposal submitted. (84 S. Ct. at Page 867). These elements, at least, constitute factors of public convenience and necessity. They are matters which the Commission *must* consider in an initial certification, or in affixing any condition to a certificate to be issued. The evidence tendered by Superior and erroneously rejected by the Commission would cover these items, *i.e.*, the financial setup and characteristics of the rate structure would be disclosed by Superior's cost-of-service (J. App. 365-369); the adequacy of the gas reserves is a relative matter dependent on the extent of demand (J. App. 283-285). The feasibility of a proposed sale is determinable from the cost of drilling, operating and reworking of wells (J. App. 284, 361-365). These costs must be related to the price proposed, which should not impair the financial stability of the seller. A compensatory rate, at least the lowest reasonable rate,[8] for the sale of the gas is a minimum requirement for the feasibility of a proposed sale and maintenance of the original service for a reasonable time in the future. The con-

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[7] Which required certification for any new service, in lieu of the old requirement for certification only in areas where service was already available.

[8] *CATCO, supra,* "**** As the original Sec. 7(c) provided, it was 'the intention of Congress that natural gas shall be sold in interstate commerce **** at the lowest possible reasonable rate consistent with the maintenance of adequate service in the public interest'." (Pg. 388)

tinuity of supply is completely interrelated with the financial integrity of the producer. A producer's ability to continue operations and to keep its leases alive is dependent in large measure on the rates received. If these matters are to be "scrutinized", then clearly evidence concerning them is relevant and material. Since these are matters of public convenience and necessity, the Commission is *required* by Section 7 to consider them. *CATCO, supra.*

Not only did the Court below follow this Court in the above holding, it also followed and is supported by the various Courts of Appeals which have interpreted and followed the *CATCO* decision:

> "• • • • the Commission properly refers to circumstances under which an unconditional and permanent certificate might be issued notwithstanding the fact that the proposed price is out of line." *United Gas Improvement Company* v. *Federal Power Commission* (9 Cir. 1960), 283 F. 2d 817, 821.[9]
>
> "It is conceivable that in some circumstances public convenience and necessity may require certificating of a sale when the price is 'out of line'." *United Gas Improvement Company* v. *Federal Power Commission* (10 Cir. 1961), 287 F. 2d 159, 163.
>
> "It was clearly encumbent on the proponent of such a rate to make some showing of the 'reason why' (as it was expressed in the CATCO opinion) 21½ cents, excluding tax reimbursement, is a proper initial rate in 1958 when the parties were freely contracting in 1954 at half that figure." *United Gas Improvement Company* v. *Federal Power Commission* (5 Cir. 1961), 290 F. 2d 133, 138.
>
> "•••• the record makes it clear that the finding of public necessity and convenience here is based too strongly on the fact that arm's length dealing and the effect of supply and demand required Transco to agree to the disputed price, *rather than that the price had*

> *any relation to what might ultimately be found to be a just and reasonable price." United Gas Improvement Co.* v. *Federal Power Commission* (5 Cir. 1961), 290 F. 2d 147, 148.[9] (Emphasis added.)
>
> "We read the CATCO decision as posing for the Commission two alternative courses in cases where a natural gas company seeks certification of sales at prices which are suspiciously higher than other or former prices in the area, or which in some other way will tend to have an inflationary impact upon the natural gas market. As one solution **** (interim conditions may attach) ****. On the other hand, it may grant unconditional certification upon evidence sufficient to 'support a finding of public convenience and necessity'." *Public Service Com.* v. *Federal Power Commission,* (D.C. Cir. 1960), 287 F. 2d 146, 149.

These decisions clearly hold that a finding of public convenience and necessity requires an evaluation of ALL factors which bear on the public interest.[10] The Court below properly held that consideration of less than all of the factors and circumstances offered in evidence which may

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[9] It is to be noted that the Ninth and Fifth Circuit decisions constitute the law of the case applicable to Superior's remanded proceedings as announced by the remanding Courts. Both Courts clearly required that all circumstances must be evaluated. The relevance of such matters is not open to question in the *same* proceeding after remand. *Federal Power Commission* v. *Pacific Light & Power Co.* (1939), 307 U.S. 156, 160; *Morand Bros. Beverage Co.* v. *National Labor Relations Board* (7 Cir. 1953), 204 F. 2d 529, 532, cert. den. 346 U.S. 909. See also *City of Pittsburgh* v. *Federal Power Commission* (D.C. Cir. 1955), 237 F. 2d 741, 752-753; *American Airlines, Inc.* v. *C.A.B.* (D.C. Cir. 1951), 192 F. 2d 417, 421.

[10] The issue of confiscation is always relevant where a rate or price is fixed. *Baltimore & Ohio R. Co.* v. *United States* (1936), 298 U.S. 349, 363; *Federal Power Commission* v. *Natural Gas Pipeline Co.* (1942), 315 U.S. 575, 585; *Pacific Natural Gas Co.* v. *Federal Power Commission* (9 Cir. 1960), 276 F. 2d 350, 353.

have a present or future bearing on the public convenience and necessity is error.

In holding that the "in line" price is not the only factor to be considered in determining the public convenience and necessity, the decision of the Court below did not conflict with the holdings of any other Court of Appeals.

The decision most cited as in conflict is that of *Public Service Commission* v. *Federal Power Commission*, (D.C. Cir. 1964), 329 F. 2d 242 (Skelly). That Court held that the less extensive economic evidence there tendered was not relevant *to a determination of the "in line" price:*

> "These proceedings under Section 7, considered with the Catco decision, *permit the Commission to fix the 'in line' price,* not on a basis of cash outlay or replacement costs, but on the basis of the price level established by comparable sales contracted for by those placing gas in the area in interstate commerce." (Pg. 246, emphasis added.)

The issue before the Court in *Skelly, supra,* was *what* was the "in line" price. The petitioners contended that the Commission had found the line too low. It was in this light that the Court said: "• • • the Commission in Section 7 proceedings • • • [may] condition certificates by requiring an 'in line' initial price." Here the Court below did not even consider the propriety of the Commission's finding of "in line" price. It held that other tendered evidence was improperly rejected because it presented factors of the public convenience and necessity which must be determined along with that of whether the price was "out of line." It was evidence which might justify even an out-of-line price. The Court held that such evidence should have been considered because, despite its prime importance, price line is not the sole factor of public convenience and necessity.

The action of the Court below squares completely with the further holding in *Skelly, supra,* that while economic evidence is not relevant to an "in line" determination

> "In so deciding we need not hold that the Commission may never consider such evidence if the circumstances in a particular case move it to do so consistently with its obligations under Catco." 329 F. 2d at Pg. 247.

Since *CATCO* requires an evaluation of all factors of public convenience and necessity, and the evidence here tendered presented factors other than "in line" price, it is clear that there is no conflict between *Skelly* and the decision below as to the consideration of economic evidence in determining the overall public convenience and necessity.

Nor is there any conflict with the decisions in *California Oil Company* v. *Federal Power Commission* (10 Cir. 1963), 315 F. 2d 652; *Atlantic Refining Company v. Federal Power Commission* (D. C. Cir. 1963) 316 F. 2d 677; or *Texaco Inc.* v. *Federal Power Commission* (5 Cir. 1961), 290 F. 2d 149. In each of these cases the issue was the proper level of the "in line" price, not whether an out-of-line price was justified by an evaluation of all of the factors of public convenience and necessity which the record disclosed. This was expressly stated in *Atlantic,* supra, at Pg. 680:

> "Petitioner argues that even under Catco there are considerations other than price in determining whether a certificate of convenience and necessity should be issued under Section 7. That, of course, is true. But here the petitioner **** agreed that price was the only issue to be considered ****."

In *California Oil Company*, supra, the Court repeatedly demonstrated that it was considering only the determination of the "in line" price:

> "* * * we also have serious doubts as to whether any of the costs or delivery services urged by petitioner to sustain the initial price of 18.5 cents are relevant at all *in determining the 'in line' price* in a Section 7 proceeding." (Pg. 659, emphasis added.)

> "We do not think that the Commission was required in this case to consider the exploration and drilling costs or the cost of delivery services *in arriving at the 'in line' price* in a certification proceeding." (Pg. 660, emphasis added.)

In none of the above cases was a record made nor evidence offered to show a "reason why" a price, even though "out of line", was nevertheless required by present or future public convenience and necessity. Nor did the record made in any of said cases show that a price conditioned below that proposed would be confiscatory. Here the evidence offered showed both of these things. The circumstances of this particular case were completely different from the other cases claimed to be in conflict with the decision below. Here the Commission determined an "in line" price which it used as the basis for ordering refunds retroactive over a four-year period. Regardless of the words used, the plain fact is that the Commission here fixed a retroactive rate based solely on "in line" price, and refused to consider any other factor or evidence. The Court below held that all factors must be considered and that an opportunity must be allowed to justify an out-of-line price. No court has decided that an out-of-line price could not be justified or that confiscation is not relevant and material to the issue of certification. There has been no conflict in the Courts of Appeals on this issue.

Refunds, if Any, Must be Based on The Difference Between a Just And Reasonable Rate And The Rate Collected Under The Invalid Commission Orders

The Court below properly held that if refunds are to be ordered "to meet the exigencies of this unique case", such refunds must be based upon the difference between the price collected and a "just and reasonable" rate.

Just as the Act, Sections 4 and 5, precludes a natural gas company from collecting rates in excess of a just and reasonable rate, so does it deprive the customers of a natural gas company of the right to a rate which is less than just and reasonable. The just and reasonable rate, which only by coincidence is the same as an "in line" price, is what the gas customer should pay, and what the gas company should receive. This is the only lawful rate under the Natural Gas Act.

The holding below on this point is clearly consistent with the decision in *Skelly, supra,* which held that refunds could be ordered of rates collected under temporary certificates but that such refunds, if any, should be based on standards of equity. The Court there remanded the cause for "further development and fuller consideration of the equitable factors * * *" and pointed out:

> "The existence of the power, however, does not mean that its exercise is mandatory, as petitioners * * * assert. Here we follow the standard adopted by the Commission, namely, the standard of equity * * *We do not attempt an enumeration of all equitable considerations involved. * * * There must be, with the assistance of the parties, a broader and more penetrating analysis and consideration of the factors pro and con a refund, and its amount or extent, in arriving at an equitable conclusion." (Pg. 250)

As said in *Atlantic Coast Line R. Co.* v. *Florida* (1935), 295 U.S. 301, the inquiry is not whether Superior should

have received the money but rather whether, having received it, Superior should be required to repay all or any part of it. Any claim of restitution of money paid by erroneous judgment or order is a claim of equity and not of right. Restitution does not lie unless unjust enrichment has occurred. If the holder of the money has not profited, there is no equitable basis for restitution. *Atlantic Coast Line, supra,* Pg. 309-313. This also brings into sharp focus the error of the Commission in refusing to receive or consider evidence of cost-of-service, financial requirements, and economic trends, which showed that the unit prices were less than Superior's actual cost of finding and producing the gas and less than its financial requirements. This rejected evidence showed that Superior was not enriched at all, either justly or unjustly. Unwittingly, it had agreed to sell this gas at less than cost during the initial contract period because such contracts had not been negotiated on a cost basis or even with knowledge of actual costs. No principle of restitution or equity will support the refund to the "in line" price on the record here. Such a refund would be confiscatory rather than equitable. Public convenience and necessity, the criterion for certification under Section 7, can never require that the Commission compel refunds based on confiscatory rates. Confiscation is always relevant where a rate or price is involved. *Baltimore and Ohio R. Co.* v. *United States,* and *Federal Power Commission* v. *Natural Gas Pipeline Company of America,* footnote 10 supra. This is particularly true in the unique situation here, and this Court's holding in *Wisconsin* v. *Federal Power Commission* (1963), 373 U.S. 294, is in point:

"• • • the sole question was whether all or any part of the increases had to be refunded by Phillips. Having decided on the basis of substantial evidence that

the increases did not bring revenues up to cost of service, the Commission properly concluded, on the only matter before it with respect to these dockets, that no refund obligation could be imposed." (Pg. 306)

The Moratorium on Contractually Authorized Rate Increases

The Court below followed the well established rule that the Commission has no power under the Act to condition a *permanent* certificate so that the natural gas company will be deprived of the statutory procedures for changing rates after such certificate has become effective. That the Commission has the power to so condition *temporary* certificates because of their ex parte nature is no basis for disruption of the comprehensive scheme of rate regulation designed by Congress on a permanent basis. The Commission order here would deprive these applicants of their statutory rate changing rights and prevent filing for price increases permitted by contract for nearly four years in the future.

This Court has repeatedly interpreted the Act as authorizing gas companies to fix and file rates under Section 4 after permanent certification has been granted. Citing its oft-quoted decisions in *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.* (1956), 350 U.S. 332 (Mobile); and *United Gas Pipe Line Co.* v. *Memphis Gas, Light and Water Division* (1958), 358 U.S. 103, at Pg. 113 (Memphis), this Court in (*CATCO*), *supra,* said at Pg. 389 that Section 7(e) vests control in the Commission of the conditions under which gas may be initially dedicated, and that once dedicated there can be no withdrawal without Commission approval, but:

"The gas operator, although to this extent a captive subject to the jurisdiction of the Commission is not

without remedy to protect himself. He may, *unless otherwise* bound by contract **** file new rate schedules with the Commission. This rate becomes effective upon its filing, subject to the 5-month suspension provision of Section 4 * * * *This not only gives the natural gas company opportunity to increase its rates where justified* but likewise guarantees that the consumer may recover refunds for moneys paid under excessive increases." (p. 389, Emphasis added.)

Again, in *Wisconsin* v. *Federal Power Commission, supra,* this Court said, at p. 304:

> "Thus we have sustained the right of a seller to file an increase under a contract which, in effect, authorized him to do so at any time." (citing Memphis, supra)

In its most recent decision on the matter, *Federal Power Commission* v. *H. L. Hunt, supra,* this Court carefully distinguished between temporary and permanent certificates, and said 84 S. Ct. at 866:

> "Under the procedures of the Act, it is at the point of permanent or unconditional temporary certification that the provisions of Section 4 become applicable. The gas has been permanently certificated into interstate commerce and the independent producer is then free to pursue the rate filing procedure of that section."

The Courts of Appeals which have recognized the conditioning power of the Commission under Section 7 have largely based such power on the right of the natural gas company to file rate changes under Section 4 once the permanent certificate is granted. See *The Atlantic Refining Company* v. *Federal Power Commission* (D.C. Cir. 1963), 316 F. 2d 677, 679:

> "In arriving at initial rates under Section 7, the Commission, of course, does not foreclose a company from obtaining an increase under Section 4. * * * *

> Since there is no mechanism for refund of overcharges under Section 7, if the Commission is to err in setting an initial rate, it should err on the low side *because the company, under Section 4, can immediately increase the rate,* subject to disallowance by the Commission after a full rate proceeding, the public being protected with reference to refunds in the interim." (Emphasis added.)

See *Texaco Inc.* v. *Federal Power Commission,* (5 Cir. 1961) 290 F. 2d 149, 156:

> "* * * we find no authority for holding that a producer does not have the right immediately to file a proposed rate increase of 20 cents per Mcf after complying with the condition that it file a new schedule carrying an intial price of 17.7 cents in lieu of the 20 cent rate in the contract. * * * *"

And *California Oil Company* v. *Federal Power Commission* (10 Cir. 1963), 315 F. 2d 652, at Pg. 660:

> "* * * * we think it is appropriate here to say that *there is nothing to prevent petitioner from immediately filing a proposed rate increase* to 18.5 cents after complying with the condition requiring it to file a new schedule carrying an initial price of 15.384 cents per Mcf, which it apparently has done. * * * *"

The Petitioners here suggest that *H. L. Hunt, supra,* and *Federal Power Commission* v. *Texaco Inc.,* 377 U.S. 33, are "inconsistent in principle and reasoning" with the decision below.[11] Such is not the case. *H. L. Hunt,* as mentioned above, involved such a condition in a *temporary* ex parte order:

> "In view of the ex parte nature of the proceeding, it appears only fair to all concerned that the condition upon which the rate was temporarily certified be con-

[11] Petition No. 756, Pgs. 12-13.

tinued unchanged until the permanent certificate is issued."

Also see quotation from the *same case, supra,* Pg. 17.

Texaco Inc., supra, is wholly inapposite. It sustained a general rule which proscribed particular contract provisions as contrary to public interest because they might provide "indefinite" pricing. That order and the reasoning sustaining it lend no precedent for an *ad hoc* determination that definitely stated pricing provisions to be effective at stated points in time may be held ineffectual, particularly when there is no record evidence to support such proscription and the hearing called was limited in scope to only the "public interest INITIAL price".

The decision below on this point is supported by unbroken decision, the Act itself, and is eminently correct.

The Practicality of the Decision Below

We have pointed out above that the decision below on the issues raised by the several Petitions here opposed is legally correct and is supported by unbroken precedent. The Petitioners, however, contend that the effect of such decision will create impossible administrative burdens and create hearings that constitute administrative monstrosities. We submit that any other procedure will lack legality and therefore is wholly impracticable.

The Natural Gas Act was designed by Congress to place a burden on the Commission. Excepting administration of the Federal Power Act, the Commission has no other reason to exist. Thus, it is no answer to say that the full hearings required by the Natural Gas Act to permit all applicants who are, or propose to become, natural gas companies to advance and protect their statutory rights, and those protected by the Constitution will inter-

fere with expeditious administration of the Act. Such is administration of the Act.

No one belittles the administrative difficulty and burden of determining and weighing all aspects of present or future public convenience and necessity. Nor can it be denied that consideration of only part of the factors of public convenience will reduce the burden and permit more expeditious disposition of pending applications. The same result would follow from a construction that the Act regulates natural gas companies in only one geographical area, rather than the whole United States, but both are contrary to the Congressional enactment and they would be equally illegal. The Act is designed to protect the rights conferred thereby on natural gas companies and the public with all expedition that is reasonably possible. Not to provide expedition at all costs and in violation of such rights.

It is contended that deferment of refunds until the amount, if any, by which the rates collected can be determined to exceed just and reasonable rates for the applicants is contrary to the purpose of the Act. A type of "justice delayed is justice denied" argument. The conclusion would have merit if the premise were well founded. Justice here demands that applicants receive, and their customers pay, a just and reasonable rate. Neither is entitled under the Act to more or less. Only a just and reasonable rate is lawful under the Act and its only purpose is to protect consumers against unreasonably high rates. All concede that an "in line" price is wholly unrelated to a just and reasonable rate.

Petitioners point to "administrative monstrosities" which would result from a need to weigh and consider all factors of public interest, or from the need for just

and reasonable rate determinations for each of these applicants. They fail to note that this is exactly what the Act provides. Each applicant and each natural gas company is entitled to such type of hearing. Administrative monstrosities result from an unbridled use of the consolidation power. The present situation might well be called a monstrosity. Supra Pg. 3. This monstrosity and its progenitors have done little to expedite final disposition of any of the matters involved.

Expeditious disposition of certificate and rate matters before the Commission would seem to be best obtained by creation of standards for such hearings consistent with the protection of the rights of the parties provided for by the Act. Announcement of factors of public convenience and necessity which would be deemed sufficient to justify a price in excess of an "in line" price, or be deemed to amount to a "reason why" such price is required by public convenience and necessity would eliminate an applicant's need to present testimony on every available factor of public interest. The same would be true in connection with the determination of just and reasonable rates. This approach would expedite preparation of cases and the time for hearing and decision, without violation of the Commission's duty to grant full and fair hearings.

The decision below points to the unusual and peculiar circumstances of the instant proceeding. In this unique situation the procedure provided below is the only available legal procedure, and it in fact entails no undue or impossible administrative burdens. The end to be sought is final disposition, not a series of short but ineffectual hearings.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the Petitions For Writ of Certiorari should each be denied.

Respectfully,

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In the

Supreme Court of the United States

OCTOBER TERM, 1964

Nos. ~~671, 678 & 756~~ 21, 22, 32

THE UNITED GAS IMPROVEMENT COMPANY, LONG ISLAND LIGHTING COMPANY, and PHILADELPHIA ELECTRIC COMPANY,

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,

FEDERAL POWER COMMISSION,

v. *Petitioners,*

CALLERY PROPERTIES, INC., J. R. FRANKEL, MARGARET HUNT HILL, TRUSTEE, J. RAY McDERMOTT & CO., INC., OCEAN DRILLING & EXPLORATION COMPANY, PLACID OIL CO., CAROLINE HUNT SANDS and LOYD B. SANDS, and THE SUPERIOR OIL COMPANY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION

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In the

Supreme Court of the United States

OCTOBER TERM, 1964

Nos. 671, 678 & 756

THE UNITED GAS IMPROVEMENT COMPANY, LONG ISLAND LIGHTING COMPANY, and PHILADELPHIA ELECTRIC COMPANY,

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,

FEDERAL POWER COMMISSION,

Petitioners,

v.

CALLERY PROPERTIES, INC., J. R. FRANKEL, MARGARET HUNT HILL, TRUSTEE, J. RAY McDERMOTT & CO., INC., OCEAN DRILLING & EXPLORATION COMPANY, PLACID OIL CO., CAROLINE HUNT SANDS and LOYD B. SANDS, and THE SUPERIOR OIL COMPANY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF IN OPPOSITION

Caroline and Loyd B. Sands, Placid Oil Company, and Margaret Hunt Hill, Trustee, Respondents in the captioned cases file this their joint Brief in Opposition and pray that the various petitions for the writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on October 14, 1964, be denied.

OPINION BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at 335 F. 2d 1004 and is printed as Appendix B to the petition of United Gas Improvement Company, *et al.*, in Case No. 671 (pp. 9a-37a). The jurisdictional prerequisites are properly alleged in the respective petitions.

STATUTES INVOLVED

The pertinent provisons of the Natural Gas Act (Sections 4, 7, and 19), 52 Stat. 821 et seq. (1938 as amended, 15 U.S.C. 717-717w) are set forth in the appendix to the Petition in Case No. 756 (pp. 16-20) and in the related petition filed by Superior Oil Company in Case No. 776 (pp. 48-51).

QUESTIONS PRESENTED

1. Where gas has been dedicated to interstate use in reliance upon unconditioned permanent certificates of public convenience and necessity which are later judicially remanded for further consideration, may the Commission upon reconsideration refuse to receive and consider cost and economic evidence and still discharge its responsibility under Section 7(e) of the Natural Gas Act by making a limited inquiry as to whether the contract prices are in-line?

2. Where gas has been dedicated to interstate use in reliance upon unconditioned permanent certificates of public convenience and necessity which are later judicially remanded for further consideration, may the Commission upon

reconsideration, after fixing an initial rate without any consideration as to whether such rate is just and reasonable, impose a moratorium on the filing of Section 4 price increases as a condition to the re-issuance of permanent certificates of public convenience and necessity?

3. Where gas has been dedicated to interstate use under valid unconditioned permanent certificates which are later judicially remanded to the Commission for further consideration, may the Commission upon reconsideration, when the issue of confiscation has been timely raised, require retroactive refunds without first determining that the amounts required to be refunded were unlawfully collected?

STATEMENT

On September 4, 1958, the Federal Power Commission (Commission) issued its Opinion No. 315[1] which granted Respondents Margaret Hunt Hill, Trustee and Placid Oil Company unconditioned permanent certificates of public convenience and necessity authorizing sales of natural gas to Transcontinental Gas Pipe Line Corporation (Transco) at a price of 21.5¢ per Mcf plus 2.05¢ per Mcf tax reimbursement. After complying with the Commission's requirements regarding the filing of their respective gas purchase contracts, sales were initiated pursuant to this certificate authority. United Gas Improvement Company and others sought judicial review of Opinion No. 315. Although this opinion was

[1] 20 FPC 264 (1959).

first affirmed by the Court of Appeals for the Third Circuit,[2] it was subsequently summarily remanded to the Commission by this Court,[3] with instructions for "a reconsideration and redetermination in the light of *CATCO, (Atlantic Refining Company v. Public Service Commission of the State of New York*, 360 U.S. 378, 79 S. Ct. 1246 (1959))."

On August 10, 1959, the Commission issued its Opinion No. 327 wherein it similarly granted Respondents Caroline and Loyd B. Sands a certificate of public convenience and necessity to make sales of natural gas to Hope Natural Gas Company (Hope) at an initial price of 21.5¢ per Mcf plus a tax reimbursement of 2.05¢ per Mcf. Shortly thereafter, after filing their Gas Purchase Contract with the Commission, Respondents commenced deliveries of gas thereunder. Public Service Commission of New York (New York), however, sought judicial review of Opinion No. 327. Whereupon the Court of Appeals for the District of Columbia Circuit[4] reversed the Commission's order granting unconditioned certificates and remanded the case to the Commission with instructions to "hold further hearings in which Petitioners and other producer applicants might, if they so choose, to either augment the record so as to support certificate authorization without a price condition or to seek a certificate appropriately conditioned."[5]

---

[2] *United Gas Improvement Company, v. Federal Power Commission*, 269 F. 2d 865 (3rd Cir., 1959).

[3] *PSC v. Federal Power Commission*, 361 U.S. 195 (1959).

[4] *Public Service Commission v. FPC*, 287 F. 2d 146, (D.C. Cir., 1960) cert. denied, 365 U.S. 880 (1961).

[5] 287 F. 2d at pg. 150.

Thus it is the Commission's action following these judicial remands which is the subject of these appeals. Contrary to procedure followed by the Commission in other remanded proceedings,[6] when the foregoing judicial mandates were returned from the Courts of Appeals, the Commission did not take immediate action. Not until May 10, 1961, was each of the remanded proceedings consolidated with the Southern Louisiana Area Rate Proceeding, Docket No. AR61-2, *et al.* Some eight months later, without any hearing having been held in this area proceeding, on January 10, 1962, the Commission issued an order warning Respondents that the Commission might subsequently require as a condition to permanent certificate authorization that Petitioners make retroactive refunds of any revenues received from the subject sales to the extent, if any, that such revenues exceeded the rates ultimately found to be in accord with the requirements of the public convenience and necessity. On March 7, 1962, in denying Respondents' Application for Rehearing of the January 10 order, the Commission severed Respondents' respective certificate applications[7] from the Area Rate Proceeding in AR61-2 and consolidated them with other similarly remanded certificate proceedings for a "separate and expeditious disposition".

Pursuant to this March 7 order, hearings were commenced on July 18, 1962, ostensibly for the purpose of permitting

[6] In the remanded *CATCO* proceedings the Commission immediately issued temporary certificates containing refund clauses to replace the permanent certificates vacated by the Supreme Court.

[7] *Margaret Hunt Hill, Trustee*, Docket No. 14109; *Caroline Hunt Sands*, Docket No. G-17398; *Placid Oil Company*, Docket No. G-13183, G-13184.

Respondents to augment the record so as to support unconditioned certificate authority as directed or suggested by the judicial remands. However, a rather abbreviated hearing was held in which essentially all of the evidence offered by Respondents was rejected. After conclusion of such hearings, the Presiding Examiner issued an initial decision on December 7, 1962. Exceptions to this decision were filed by various parties. On July 17, 1963, the Commission issued its Opinion No. 398[3] in which it again granted permanent certificates of public convenience and necessity to Respondents and other producer applicants conditioned upon a reduction in initial price to 18.5¢ per Mcf plus 1.5¢ per Mcf tax reimbursement, and a refund with interest of all amounts previously collected in excess of that reduced price. In addition, a moratorium upon the filing of any price increase in excess of 23.55¢ per Mcf was imposed pending the issuance of final decision in Docket No. AR61-2 or until July 1, 1967, whichever is earlier.

After timely filing petitions for rehearing and reconsideration, Respondents filed Petitions for Review in the Court of Appeals for the Fifth Circuit alleging several errors made by the Commission. On August 14, 1964, the Court of Appeals for the Fifth Circuit issued its opinion in which it found that the Commission erred in these remanded proceedings in the following three respects: (1) excluding cost and economic evidence, (2) imposing a price moratorium on permanent certificates, and (3) ordering retroactive refunds without predicating the amount of refunds upon a "just and reason-

[3] *In Re Placid Oil Company, et al.*, Docket No. G-13183, *et al.*, 30 FPC 283, 30 FPC 682.

able" rate determination. In view of these findings, the Court did not consider other questions and errors urged by Respondents, namely as to the validity of the Commission's "in-line" price determination or the requirement that interest be paid on the amounts refunded.

REASONS FOR DENYING THE WRIT

The questions presented in each of the three petitions to which Respondents reply, although stated differently, in essence merely attack the principal holdings of the court below which reversed the Commission's action in remanded certificate proceedings. Each of the questions is carefully phrased by Petitioners to point up either (1) a question of great importance to the Commission's future regulatory responsibilities, or (2) a conflict between the Fifth Circuit and some decision of either this Court or some sister circuit court. In so doing, the Petitioners have lifted the Fifth Circuit's decision out of its context and have completely distorted the very limited frame of reference in which the issues therein were resolved by the court below. On both counts the Petitioners are wrong, and their petitions should be denied for the following reasons:

1. The Issues Presented Are Unique, and Are Not of Sufficient Importance to Warrant Intervention of This Court.

As the Court below recognized, this case is unique in many respects. The circumstances, i.e., remanded certificate proceedings, under which it was presented will likely never arise again. The fact cannot be overemphasized that it is the Com-

mission's action in a remanded proceeding which is under review rather than action in an initial certificate proceeding. Even the Solicitor General, on behalf of the Commission recognized that "* * * the ruling below is in terms confined to the rather unusual situation in which refunds are ordered because of the invalidation of the original certificate * * *" (Br., p. 14).[9]

Although the subject certificate applications were before the Commission for the issuance of certificates of public convenience and necessity under Section 7 of the Natural Gas Act, the unique circumstances under which they were presented, distinguishes them from the ordinary Section 7 proceeding. Unlike the usual certificate proceeding, the principal issue here was not an initial dedication of gas supplies to interstate commerce, but merely what conditions, if any, should be attached to the authorization for continued sales of gas which had been dedicated and flowing in interstate commerce for a period of five years. This retrospective nature of the Commission's inquiry clearly distinguishes these cases from the usual Section 7 certificate proceeding.

The typical Section 7 case involves the initial commitment of new sales of gas to the interstate market. In such cases, it is the Commission's function after careful analysis to prescribe, if necessary, any "conditions precedent to the entry of natural gas in interstate commerce", *FPC v. Hunt*, 376 U.S. 515. Under some circumstances, usually loss of lease,

[9] Although this reference was confined to the refund question, its logic applies with equal force to the other issues raised.

drainage, or need for the gas, prompt action may become imperative, thus precluding a detailed analysis of each particular sale. In such cases, the Commission may authorize the sales to commence immediately and defer until a subsequent proceeding a complete analysis of various aspects thereof. If in so doing, the Commission imposes a condition, the producer then has the option to either accept the conditioned temporary authorization, wait for a thorough analysis of his proposal at the hearing on permanent certificate authorization, or find another market for his gas.

Very different, however, are the circumstances under which the subject case was presented to the Commission. The subject sales were dedicated to interstate commerce, and deliveries commenced in 1958 and 1959. They were thus captives of the interstate market for under this Court's rule in CATCO,[10] gas once dedicated cannot be withdrawn from interstate commerce without Commission approval. Therefore the issue before the Commission on July 17, 1963, the date of its Opinion No. 398, did not involve an initial commitment of gas to interstate commerce. That issue had become moot in 1958. The sole issue before the Commission was what conditions, if any, should be attached to certificates authorizing the continued sales which had been dedicated to interstate commerce some four or five years earlier.

It was under these unique circumstances that the court below was presented with the questions of (1) whether the Commission should consider the cost and financial evidence, (2) whether refunds should be required without a determina-

[10] Atlantic Refining Co. v. Public Service Commission of New York, 360 U.S. 378 (1959).

tion that the prices collected were unlawful, and (3) whether a moratorium on future price increases was lawful. The issue of whether the Commission may impose these restrictions in the ordinary initial dedication Section 7 proceeding was not at issue in this case.

Thus when these distinctions are taken into account, not only does the correctness of the decision by the court below become obvious, but also the lack of necessity for any intervention by this Court. In this light, especially empty are Petitioners' various assertions of the urgency and importance of the questions presented. Particularly is this true of the Solicitor's complaint that "* * * the Fifth Circuit's ruling would entail a drastic enlargement in the scope of certificate proceedings * * *" As mentioned, the issues presented relate exclusively to the particular sales involved; their resolution does not bring into focus any general administrative policy regarding the issuance of certificates of public convenience and necessity.

Likewise, exaggerated is the Solicitor's assertion that this decision "* * * would increase administrative burdens to the point that the Commission's efforts to bring the producers of natural gas under effective regulation would be significantly impaired * * *" There is no doubt that the Commission's administrative burdens would be considerably easier if hearings were not required in issuing certificates under Section 7. Regulation by *fiat* is immeasurably simpler than regulation based upon hearings, evidence and argument. However, the undeniable fact is, that both the Natural Gas Act, *supra*, and the Administrative Procedure Act, 60 Stat. 237-244, 5 U.S.C.

§§ 1001-1011, prescribe that certificates shall be issued after hearings in which evidence and arguments are offered and received. Particularly is this true in this case where the Commission was operating under judicial directives from the Court of Appeals "to hold further hearings in which Petitioners * * * might * * * augment the record so as to support certificate authorization without price condition * * *", (*PSC v. FPC*, 287 F. 2d 146, 150) and from this Court for "* * * a reconsideration and redetermination in the light of CATCO," (*PSC v. FPC*, 361 U.S. 195). CATCO was reversed for lack of evidence not for the tender of too much evidence.

Furthermore, even in a normal certificate case, it is alarming to anticipate the adverse effect that the Commission's exclusive "in-line" price concept will ultimately have upon the interstate gas consumer. For if the issuance of certificates in Section 7 proceedings is restricted to an in-line determination, and the gas producer for legitimate reasons is forced to reject a proffered certificate because of the price level, there is no other procedure under the Natural Gas Act by which the Commission may make its statutory determination of whether the proposed sale "is or will be required by the present or future public convenience and necessity." The resultant effect is that the gas in such a case will be committed to another market and forever lost to the interstate gas consumer. Especially is this tragic when the circumstances may be such, that had the Commission merely heard the producers' case, it too would have concluded that because of other factors, the public convenience and necessity required the certification of the proposed sale irrespective of the in-

line price determination. Certainly such a possibility was contemplated by this Court in CATCO which called upon the producers to show the "reason why" their out-of-line prices should be certificated. However, irrespective of the normal certificate case, in the unique circumstances of this case, i.e., judicial remand for taking additional evidence, something more than the price-only approach was imperative.

Respondents would make clear that they do not agree that the Fifth Circuit was in all respects correct in its holding. For it seems obvious that insofar as it authorizes the Commission to order retroactive refunds the court has sanctioned a reparation order which this Court has held to be beyond the Commission authority, *FPC v. Hope Natural Gas Company*, 320 U.S. 591, 618. However, on balance the court's opinion is one which, in a difficult and unusual situation, is fair to all parties, industry and consumer interests alike, and should be upheld. Its full import in this rare situation simply requires that the rates during both the *prior* period (1958-1963) and the future period (1963-and following) be just and reasonable, no more and no less, except where prohibited by contract. What could be fairer? Neither party can then reap a windfall at the expense of the other.

2. The Decision of the Court Below Is Consistent With the Provisions of the Natural Gas Act and the Applicable Decisions of this Court and Is Not in Conflict with the Related Decisions of Other Courts of Appeals.

Each of the three petitions allege a conflict between the decision below and an assorted number of decisions by this

Court and other Courts of Appeals. Significantly, it is admitted, that some of the alleged conflicts are in the rationale of the decisions rather than in the decisions themselves. A careful examination of the cited decisions will, however, reveal a consistency rather than a conflict with the Fifth Circuit's decision. Most of the alleged conflicts are on their face without merit. As to the more vigorously asserted ones, Respondents would point out the following:

(1) *Exclusion of Evidence Issue:* The principal conflict alleged is with the Court of Appeals for the District of Columbia Circuit in *Public Service Commission of the State of New York v. Federal Power Commission (Skelly)*, 329 F. 2d 242, certiorari denied *sub nom. Prado Oil & Gas Co. v. Federal Power Commission*, 377 U.S. 963. Admittedly this decision sustained the issuance of permanent certificates conditioned upon a reduction in initial price to the "in-line" price level derived solely from prices for comparable sales. However, in context *Skelly* is clearly distinguishable from the decision below. In the first place, as the Solicitor's brief recognizes (p. 10), *Skelly* dealt solely with the problem of what weight to give the evidence once it had been admitted, whereas the Court below dealt directly with the question of the Commission's authority to exclude the evidence. There is a signal difference between the admissibility of evidence and the weight to be accorded such evidence. Moreover, the District of Columbia Circuit in *Skelly* did not make its holding exclusive; it specifically stated "* * * we need not hold that the Commission may never consider such evidence if the

circumstances in a particular case move it to do so consistently with its obligation under Catco" (329 F. 2d at p. 246). Since the evidence was here summarily excluded, the Court below did not even get to the question which was before the D.C. Circuit in *Skelly* therefore making the alleged conflict an impossibility. The Court below merely held that the Commission was required to receive and evaluate cost and economic evidence under the unique circumstances presented.

Moreover, as the Court below recognized, the evidence in *Skelly* was much more limited than the evidence tendered in this case. It is pure speculation to presume that the D.C. Circuit would have reached the same result in *Skelly* had the evidence there been as extensive and of the same nature as the evidence which was before the Court below in this case.

It is further pertinent that the issue in the *Skelly* case was primarily restricted to the proper determination of the price line. It also essentially involved an initial dedication of gas to the interstate market; its purport was therefore almost entirely prospective in nature. By contrast, the present case involved a reopened proceeding remanded for the purpose of taking additional evidence and covered gas which had been irretrievably committed to interstate commerce five years earlier; its purport was *retroactive* as well as prospective in nature. Certainly different evidence may be required for these differing situations. The fact that the Commission may not be required to consider decisive, economic and cost evidence in the first instance does not mean that

it need not even admit and evaluate such evidence in the second instance.

(2) *The Moratorium Issue:* The asserted conflict on this issue is principally with the rationale of this Court's decision in *FPC v. Hunt*, 376 U.S. 515 and to some extent in Texaco,[11] CATCO,[12] and Mobile.[13] The Solicitor alleges that the opinion below subordinates Section 7 to Section 4, reasoning that since the Commission has the power "to prescribe conditions for the entry of natural gas into interstate commerce" it has unlimited powers to restrict Section 4 rate filings. This position is simply not well founded, and is itself in conflict with this Court's decisions in the above cited cases. Its practical effect is a complete subordination of Section 4 to Section 7, the reverse of that which the Commission now complains.

The interplay between Sections 4 and 7 of the Act, as the Court below recognized, has been clearly spelled out by this Court in *Hunt*. Although the Court in *Hunt* upheld a limited moratorium as a condition to temporary certificates, the Court noted precisely the point in time at which the rights of a producer and the powers of the Commission under Section 4 become applicable:

> "Under the procedures of the Act, it is at the point of permanent or unconditional temporary certification that the provisions of §4 become applicable. The gas has been permanently certificated into interstate commerce and the independent producer is then free to pursue

[11] *Federal Power Commission v. Texaco*, 377 U.S. 33 (1964).

[12] *Atlantic Refining Co. v. Public Service Commission of New York*, 360 U.S. 378 (1959).

[13] *United Gas Pipe Line Co. v. Mobile Gas Service Corporation*, 350 U.S. 332 (1956).

> the rate filing procedure of that section." (376 U.S. at p. 523)

This language is unequivocal. In it is the clear recognition that permanent certification is the point at which Section 4 becomes applicable. The Commission, however, in the present cases arbitrarily denied Respondents their Section 4 privileges as a condition to the re-issuance of *permanent* certificates. Following this Court's reasoning, the court below had no other alternative but to strike down the Commission's moratorium. Respondents submit that in this case the court below was correct in doing so.

Notwithstanding the Solicitor's assertion to the contrary, the Commission was here not exercising its power to "condition a producer's entry into the interstate market". (p. 12) When the previous five-year period (1958-1963) is coupled with the future four-year moratorium (1963-1967) it was in effect *freezing* prices for nine years, in some instances for the life of the properties.[14] This makes rather ridiculous the Solicitor's characterization of the moratorium condition as a "limited waiver of * * * contractual right to file price increases".

Further, as the court below recognized, this Court's decisions in *Texaco, Catco* and *Mobile* support this construction of the *Hunt* decision. Therefore the so-called conflict

[14] The drastic results may be illustrated by considering the plight of Respondents Caroline and Loyd B. Sands. As a result of a stay of the moratorium provision, a Section 4 price increase was filed on one of the sales initiated in 1958. The Examiner's initial decision found 24.55¢ to be a just and reasonable rate. During the course of the hearing, the sworn testimony projected the life of the property involved to be only 3 to 5 years or 1967. Thus the effect of the Commission's moratorium, if upheld, would be to deny for the life of the property a just and reasonable rate. Likewise the only sale involved in Respondent Placid Oil Company's Docket No. G-13184 has been terminated; the wells have been depleted and abandoned and the leases canceled.

on the moratorium issue is non-existent. Since the Court has previously spoken so clearly on the point now raised, there is no need for further elucidation.

(3) *The Refund Issue:* The principal conflict on this issue is again asserted to be with the D.C. Circuit's *Skelly, supra.* decision which upheld the Commission's power to order refunds of moneys collected under temporary certificates. Actually the Solicitor does not advance this argument with much fervor, admitting that this case is a "rather unusual situation" and that "the [refund] issue is not in itself of sufficient importance to warrant intervention of this Court". The only basis for requesting certiorari on this refund issue is in conjunction with the other issues raised by the Commission. Only UGI and New York seriously urge the granting of certiorari on this point. Respondents agree with the Commission's basic premise that the issue is not of sufficient importance to warrant intervention by this Court. Moreover the presence of other issues does not enhance its importance. If alone an issue is not important enough to merit the attention of this Court, then it is not, in concert with other issues.

Regardless, a careful review of *Skelly* on the refund issue reveals that there is no conflict. Significantly *Skelly* required as a condition precedent to ordering refunds a consideration by the Commission of the equities of the affected parties. In fact this was the very basis upon which *Skelly* was remanded to the Commission. The holding that equities must be considered without defining those equitable considerations is certainly not inconsistent with the holding of the court below which simply required in these circumstances

that refunds be predicated upon a just and reasonable price level. Actually by ordering refunds without looking beyond the "in-line" price as the Commission has here done, the Commission itself is in conflict with *Skelly*. The D.C. Circuit had the in-line price before it; had that been the sole basis upon which refunds were to be ordered, there would have been no reason to remand the case to the Commission for further consideration.

Respondents submit that if any conflict does exist, it is with this Court's holding in *FPC v. Hope Natural Gas Company*, 320 U.S. 591, which denies the Commission the power to make reparation orders. To the extent that the Court below authorizes retroactive refunds, it has authorized a reparation order. However, as indicated, Respondents are willing to accept as a package the Fifth Circuit's resolution of the issues in this "unusual situation."

CONCLUSION

For the foregoing reasons it is respectfully submitted that these Petitions for Writs of Certiorari should be denied.

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By Thomas G. Crouch
Thomas G. Crouch

January 8, 1965

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964.

No. 671

THE UNITED GAS IMPROVEMENT COMPANY, LONG ISLAND LIGHTING COMPANY and PHILADELPHIA ELECTRIC COMPANY,
Petitioners,

v.

CALLERY PROPERTIES, INC., J. R. FRANKEL, MARGARET HUNT HILL, Trustee, J. RAY McDERMOTT & CO., INC., OCEAN DRILLING & EXPLORATION COMPANY, INC., PLACID OIL CO., CAROLINE HUNT SANDS and LOYD B. SANDS, and THE SUPERIOR OIL COMPANY,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* OF CONSOLIDATED EDISON COMPANY OF NEW YORK, INCORPORATED, PUBLIC SERVICE ELECTRIC AND GAS COMPANY AND THE BROOKLYN UNION GAS COMPANY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI.

Consolidated Edison Company of New York, Incorporated (Con Edison), Public Service Electric and Gas Company (Public Service), and The Brooklyn Union Gas Company (Brooklyn Union), respectfully move for leave to file the accompanying brief *amici curiae* in support of the petition for certiorari. The consents of the petitioners have been obtained. The consents of the respondents have been requested but have not been granted.

Each of the movants is a public utility company which, among other things, owns and operates a retail gas dis-

tribution system for the sale of gas to the consuming public. Movant Con Edison supplies a total annual quantity of more than 47,800,000 Mcf of natural gas to some 1,275,000 domestic, commercial and industrial customers in a population of 4,700,000 persons in its gas franchise area of The Bronx, New York, Westchester and Queens (part) Counties, all located within the State of New York. Public Service supplies a total annual quantity of 110,787,000 Mcf of natural gas to more than 1,200,000 customers in a franchise area having a population in excess of 4,300,000 persons, which extends from the Hudson River opposite New York City to the Delaware River at Trenton and thence to the city of Camden, all in the State of New Jersey. Brooklyn Union supplies a total annual quantity of 76,000,000 Mcf of natural gas to more than 1,300,000 consumers in a franchise area having a population of approximately 4,000,000 persons in the Counties of Kings, Richmond and Queens (part), all in the City and State of New York.

In short, the three Movants, together with the three Petitioners in this case, are responsible for the greatest volume of natural gas supplied at retail and the greatest number of ultimate gas consumers served in the States of New York, New Jersey and Pennsylvania.

The Movants have a two-fold interest in the grant of certiorari in this case. Each of them obtains a major portion of the natural gas it resells to ultimate consumers directly from Transcontinental Gas Pipe Line Corporation and indirectly through United Gas Pipe Line Company, two of the pipeline purchasers of the natural gas supplies involved in this proceeding. They are, therefore, profoundly concerned by the effect of the decision below upon the determination of the appropriate initial price certification level for this gas, for which their suppliers are now

paying, will continue to pay, and, for periods up to six years, have paid contractual initial prices at levels (up to 23.8¢ per Mcf) which were found to be out of line and unjustified as early as 1959[1]. Because of their interest in the initial prices certificated for the instant sales, Movants participated as intervenors in the *Placid* certificate proceeding before the Federal Power Commission (FPC), which culminated in the opinions and orders reversed by the Court below (*Placid Oil Co., et al.*, Op. Nos. 398 and 398-A, 30 FPC 283 and 682, (1963), reversed and remanded sub nom. *Callery Properties, Inc.* v. *FPC*, 335 F. 2d 1004), or in the various constituent proceedings which, after remand, were consolidated in the *Placid* case.

The major significance of the decision below, however, does not lie simply in its frustration of one of the Commission's recent efforts to correct long-standing error by determining, finally, the appropriate initial prices at which these sales should have been certificated in the first instance. Of far greater and more serious importance to the Movants and to the ultimate consumers they serve, is the grave threat posed by this decision to the procedures now being developed, more than ten years after the first *Phillips* decision,[2] for the effective regulation of producer gas rates and charges under Sections 4, 5 and 7 of the Natural Gas Act. The most fundamental of these procedures, examined by this Court in the second *Phillips* case of 1963,[3] is the

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[1] *PSC* v. *FPC*, 361 U. S. 195 (1959); *UGI* v. *FPC*, 283 F. 2d 817 (9th Cir., 1960), cert. denied 365 U. S. 879, 881 (1961); *Ibid.*, 287 F. 2d 159 (10th Cir., 1960); *Ibid.*, 290 F. 2d 147 (5th Cir., 1961) cert. denied 366 U. S. 965 (1961); *Ibid.*, 290 F. 2d 133 (5th Cir., 1961) cert. denied 368 U. S. 823 (1961) and *PSC* v. *FPC*, 287 F. 2d 146 (D. C. Cir., 1960) cert. denied 365 U. S. 880, 882 (1961).

[2] *Phillips Petroleum Co.* v. *State of Wisconsin*, 347 U. S. 672 (1954).

[3] *Wisconsin* v. *Federal Power Commission*, 373 U. S. 294 (1963).

area-wide approach to the determination of just and reasonable producer rates.

It was apparent at the outset that it would be essential to the ultimate success of the area rate method for the Commission to develop a consistent interim procedure, for the period prior to the determination of just and reasonable producer rates, to permit the certification of new gas sales in interstate commerce under Section 7 of the Act, on an expeditious and non-price-disruptive basis which would, at the same time, afford adequate protection to the interests of the producer applicants and the consuming public. Taking its cue from the initial price decisions of this and other courts in the late 1950s and early 1960s, and from the new area rate approach to producer pricing considered in the second *Phillips* case, the Commission adopted, as an interim measure, the area-wide, in-line initial price method for handling producer certificate proceedings. Prior to the decision below, that method had been accorded the approval of every appellate court in which producers had sought review. *Texaco Inc.* v. *FPC*, 290 F. 2d 149 (5th Cir., 1961); *Atlantic Refining Co.* v. *FPC*, 316 F. 2d 677 (D. C. Cir., 1963); *California Oil Co.* v. *FPC*, 315 F. 2d 652 (10th Cir., 1963); and *PSC* v. *FPC*, 329 F. 2d 242 (D. C. Cir., 1964), cert. denied 377 U. S. 963 (1964).

If, however, the contrary decision of the Court below is permitted to stand, the Commission will be precluded from utilizing this procedure as an interim regulatory tool. It will, in *every* certificate proceeding, at the behest of *every* high-price producer certificate applicant, be compelled to try a case which, in magnitude and complexity, may well be equal to or greater than the *single* concurrent area rate proceeding. It will, in short, be confronted in multiple *certificate* proceedings with the very burdens which, as it told this Court, it found to be, unmanageable

and the principal reason for the necessity of an area-wide approach to producer *rate* regulation. Reimposition of this burden, at this late date, in producer certificate proceedings, will seriously jeopardize the long-awaited prospect of effective producer regulation under Sections 4, 5 and 7 of the Natural Gas Act, 15 U. S. C. §§717 c, d and f.

Because the decision below has such grave implications for Movants and the consumers they serve, the Movants are constrained to seek the permission of this Court to advance to it the arguments in support of the petition for a writ of certiorari which are set forth in the accompanying brief *amici curiae*.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 671

THE UNITED GAS IMPROVEMENT COMPANY, LONG ISLAND LIGHTING COMPANY and PHILADELPHIA ELECTRIC COMPANY,

Petitioners,

v.

CALLERY PROPERTIES, INC., J. R. FRANKEL, MARGARET HUNT HILL, Trustee, J. RAY McDERMOTT & CO., INC., OCEAN DRILLING & EXPLORATION COMPANY, INC., PLACID OIL CO., CAROLINE HUNT SANDS and LOYD B. SANDS, and THE SUPERIOR OIL COMPANY,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF *AMICI CURIAE* OF CONSOLIDATED EDISON COMPANY OF NEW YORK, INCORPORATED, PUBLIC SERVICE ELECTRIC AND GAS COMPANY AND THE BROOKLYN UNION GAS COMPANY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI.

Interest of *Amici Curiae*.

The interest of the *amici curiae* in this case is set forth in the motion to which this brief is attached.

Reasons for Granting Writ.

I. The decision below is of broad national significance because it seriously impairs the Commission's ability to carry out its statutory obligation to regulate producer gas rates and charges under the Natural Gas Act.

If the decision below is permitted to stand, producer certificate proceedings will amount to "administrative monstrosities".

The essence of the Court of Appeals' holding is that, regardless of the propriety of a Commission finding that a proposed producer initial price is "out of line", the Commission may not, on that basis, issue an initial-price conditioned certificate of public convenience and necessity. Since it has long been established that the Commission also may not, under such circumstances, issue an unconditional certificate (*Atlantic Refining Co.* v. *PSC,* 360 U. S. 378 (1959) —CATCO), it follows from this decision that, before the Commission may act upon any producer certificate application involving a high initial price proposal, it *must* receive in evidence and give consideration to whatever cost or economic data the high-price producer certificate applicant may choose to present.

A bare outline description of the excluded cost and other data proffered by the instant respondents as applicants in the proceeding before the Commission occupies nearly a full page of the Court's opinion (335 F. 2d at p. 1009). The evidence itself, limited solely to the direct presentation of the applicants, without cross examination, included the testimony of approximately 35 witnesses and 70 exhibits, several of them running many pages in length. R. 495. It contained, essentially, individual-company cost and industry or area-wide economic data. Had these data been received in evidence, it is perfectly obvious that the inter-

ests of the consuming public would have required the preparation and presentation of similarly voluminous evidence by the Commission's staff and the distribution company intervenors; that this opposing mass of evidence would have necessitated intensive and protracted cross examination; and, if prior long experience is any guide, that this conflict in turn would have led to the submission and cross examination of equally voluminous rebuttal evidence on both sides.

The Presiding Examiner clearly recognized the chaos that would result. He stated:

> "If this mountain of cost-type, economic and financial evidence had been received in the instant proceeding the instant hearing would, in effect, have amounted to the trial of some 16 different individual producer cost-type cases, and the decisional process required would have involved, in effect, the writing of some 16 different individual producer rate decisions. Any such proceeding would plainly have amounted to an administrative monstrosity." R. 496.

In the face of this inevitable consequence of its holding, the most discouraging aspect of the Court of Appeals' opinion is its complete omission of any reference to the currently pending Section 4 and 5 area rate proceeding (*Area Rate Proceeding, et al. (Southern Louisiana)*, Docket Nos. AR 61-2, *et al.*), involving these very respondents and this very producing area, in which much of the same kind of area-wide or national data as that excluded in this proceeding has been received in evidence by the Commission and is being accorded the most thorough, searching and diligent consideration. As the Court of Appeals was well aware, that proceeding had been instituted even before the instant case was begun and, despite all efforts at expedition, those hear-

ings, which have been in virtually continuous session since the early fall of 1963, are still in progress at this date. In view of that knowledge, we are dismayed by the Court's insistence that the Commission simultaneously should have received the same kind of evidence in this proceeding and, in addition, the individual-company cost evidence which is inadmissible in the concurrent area proceeding and which, indeed, has been characterized as the major obstacle to achieving any successful system of producer regulation over the past ten years.

To suggest that by means of undetailed "resourceful ingenuity" and undefined "administrative inventiveness" (335 F. 2d at p. 1014) the Commission could have prevented the admission of this mass of evidence from bogging this certificate case down into a full-dress rate hearing, is, we submit, totally unsupported and the height of unreality.

As the Court of Appeals should have been well aware, the inevitable effect of its decision is not to confirm the Commission's use of "administrative inventiveness" but to require the Commission to convert every certificate proceeding into a super (i.e., hybrid or combined area-wide and individual-company) rate proceeding, to whatever extent the high-price producer applicant may dictate by the kind and quantity of evidence he chooses to present. To confront the Commission with that unmanageable administrative burden and that unnecessary and wasteful duplication would rapidly bog down both certificate proceedings and rate proceedings into stalemate and utter futility.

II. The decision below is based on a misinterpretation of the Natural Gas Act and is in conflict with the principles and holdings of decisions by this Court.

The Commission's adoption of the area-wide, in-line initial price approach in certificate proceedings as an interim regulatory tool was an entirely appropriate procedure under the Natural Gas Act and one that was consistent with this Court's CATCO and second *Phillips* decisions. Pending the determination of just and reasonable producer prices, this approach permits the Commission to safeguard consumers against new gas prices which are out of line. At the same time, the interests of producers are safeguarded by the right to file up to contract initial price levels under Section 4 of the Natural Gas Act, subject to the duty to refund amounts later proven to have been excessive.

It was because the Commission had not yet determined just and reasonable producer rates on an individual-company or any other basis in 1959 that this Court, in CATCO, admonished it to use its initial price conditioning powers to so safeguard the consumer in certificate proceedings. It was because the Commission represented, in 1961, that it could not practicably utilize individual-company cost evidence to determine just and reasonable rates for producers that this Court, in *Phillips*, approved its decision to abandon that regulatory approach.

We do not believe there is anything in CATCO to suggest that, prior to the finding of just and reasonable rates for any particular producer in area rate proceedings, the Commission should be compelled to receive and consider in each and every high-initial-price certificate proceeding cost and economic evidence which both (a) is germane to the determination of such just and reasonable

rates, and (b) has been received and is being considered in a pending area proceeding for the very purpose of fixing such just and reasonable rates. Until the Commission has been able to decide what conclusions are to be drawn from such evidence in a single area rate proceeding, it is inconceivable that the Natural Gas Act would require it to receive the same evidence repetitiously in innumerable prior and concurrent certificate proceedings.

Similarly, we do not believe that there is anything in *Phillips* to suggest that the Commission may be compelled to receive and consider in producer certificate cases under Section 7 of the Act the very individual-company cost evidence which the Commission showed this Court (a) was not generally useful in the determination of just and reasonable producer rates under Sections 4 and 5, and (b) was so burdensome administratively as to jeopardize the entire prospect of achieving effective producer regulation. If the Commission has been able to draw few conclusions from such evidence in rate proceedings—except as to its defects and inadequacies—it is inconceivable that the Natural Gas Act would require it to admit and consider such evidence in producer certificate proceedings under Section 7, where it would have the same shortcomings.

III. The decision below is in conflict with those of other Courts of Appeal.

As we have noted in the Motion to which this brief is attached, prior to the decision in this case the Commission's utilization of the area-wide, in-line initial price approach as an interim regulatory measure in producer certificate cases had received the unanimous confirmation of reviewing Courts of Appeal. *Texaco Inc.* v. *FPC*, 290 F. 2d 149 (5th Cir., 1961); *Atlantic Refining Co.* v. *FPC*, 316 F. 2d

677 (D. C., Cir., 1963); *California Oil Company* v. *FPC*, 315 F. 2d 652 (10th Cir., 1963); and *PSC* v. *FPC*, 329 F. 2d 242 (D. C. Cir., 1964), cert. denied 377 U. S. 963 (1964).

In the last cited case, moreover, the Court of Appeals for the District of Columbia Circuit was presented with the very issue—the Commission's refusal to consider cost evidence—that was raised in the instant proceeding. That Court, contrary to the Fifth Circuit, specifically held that the Commission could not, at this stage in the development of producer regulatory principles and procedures, be compelled to accept and base its decision upon such evidence in certificate proceedings under Section 7 of the Act. The District of Columbia Court's opinion states:

> "Continental contends that the Commission erred in not considering certain costs and financial requirements, evidence with respect to which was presented to show the amount Continental would be required to receive to recoup its cash outlay with respect to one area of its production here involved, and in failing to consider evidence as to the industry's replacement costs of gas, submitted by Texaco and adopted by the other producers. However, these are not rate cases of the type in which evidence of this kind ordinarily is considered relevant. These proceedings under Section 7, considered with the *Catco* decision, permit the Commission to fix the "in-line" price, not on a basis of cash outlay or replacement costs, but on the basis of the price level established by comparable sales contracted for by those placing gas in the area in interstate commerce. The standards of Sections 4 and 5 are not those to be used in conditioning a certificate issued under Section 7; otherwise the purpose of *Catco* to avoid the consequences of the well nigh interminable proceedings incident to a rate case would be defeated. See, for example, *United*

Gas Improvement Co. v. *FPC, supra,* 283 F. 2d at 823. Consideration of the proffered evidence was not essential. In so deciding we need not hold that the Commission may never consider such evidence if the circumstances in a particular case move it to do so consistently with its obligations under *Catco.*" (329 F. 2d at pp. 246-7; footnote omitted).

We respectfully submit that the decision of the District of Columbia Court and that of the Court of Appeals below cannot be read consistently; they present an important and irreconcilable conflict as to a fundamental issue of interpretation of the Natural Gas Act; this conflict should be, and only can be, resolved by the decision of this Court.

Conclusion.

Since 1954, when this Court first explained the necessity for and declared the propriety of producer rate regulation under the Natural Gas Act, producer spokesmen have proclaimed the impracticality and impossibility of such regulation. If the decision below is permitted to stand it will vindicate that self-fulfilling prophesy. Ultimate gas consumers have now waited more than ten years for the realization of the Natural Gas Act's assurance of a "complete, permanent and effective bond of protection from excessive rates and charges" (CATCO, *supra,* 360 U. S. at p. 388). In their behalf we respectfully request this Court to prevent the long-awaited fulfillment of that assurance

from being throttled in its infancy. The writ of certiorari should be granted.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 714

OCEAN DRILLING & EXPLORATION COMPANY,
PETITIONER

v.

FEDERAL POWER COMMISSION, PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, THE UNITED GAS IMPROVEMENT COMPANY, LONG ISLAND LIGHTING COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE FEDERAL POWER COMMISSION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 3a-32a) is reported at 335 F. 2d 1004. The opinions of the Federal Power Commission, Opinions Nos. 398 and 398A, are published at 30 F.P.C. 283 and 682.

JURISDICTION

The judgment of the court of appeals was entered August 14, 1964 (Pet. App. 33a). On November 6, 1964, Mr. Justice Black granted an extension of time for filing a petition for certiorari until November 23, 1964, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTION PRESENTED

Where a court of appeals has invalidated a Federal Power Commission order granting an unconditional certificate of convenience and necessity and, on remand, the Commission conditions the certificate so as to require an initial price lower than the applicant's contract price, may the Commission require refunds of excess amounts collected for deliveries made under the original invalid certificate?

STATUTE INVOLVED

Pertinent provisions of the Natural Gas Act are set forth in the petition at pages 1a-2a.

STATEMENT

The orders set aside by the court below were issued by the Commission on July 17, 1963, to correct a series of invalidated orders issued in 1959 granting unconditioned certificates of public convenience and necessity for sales by 42 producers of gas in South

Louisiana. The sales contracts, executed in 1957 and 1958, called for initial prices ranging from 21.4 cents to 23.8 cents per Mcf.[1] Without awaiting the results of court review, the producers had accepted those certificates, commenced their deliveries, and collected at the contract prices throughout the review proceedings which resulted in the invalidation of the certificates.

Consumer representatives, who had opposed the certificate applications before the Commission on the ground that the proposed contract prices were excessive, sought judicial review of the orders in five courts of appeals. The Third Circuit sustained the Commission's action,[2] but this Court summarily reversed [3] and ordered the case remanded to the Commission for reconsideration in the light of *Atlantic Refining Co.* v. *P.S.C. of New York (CATCO)*, 360 U.S. 378. The other four courts of appeals thereupon reversed simi-

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[1] *Texas Gas Transmission Corp. (Hope Natural Gas Co.)*, Opinion No. 327, 22 FPC 378, 386-389, rehearing denied, 22 FPC 657; *The California Co. (United Gas Pipe Line Co.)*, 22 FPC 252, rehearing denied, 22 FPC 653; and *The Superior Oil Co. (Transco)*, 22 FPC 369, rehearing denied, 22 FPC 655; *Sun Oil Co. (United Gas Pipe Line Co.)*, 22 FPC 351, rehearing denied, 22 FPC 654, and *Sunray Mid-Continent Oil Co. (Transco)*, 22 FPC 361, rehearing denied, 22 FPC 652.

[2] *United Gas Improvement Co.* v. *Federal Power Commission*, 269 F. 2d 865 (C.A.3), vacated *sub nom. Public Service Commission of New York* v. *Federal Power Commission*, 361 U.S. 195.

[3] *Public Service Commission of New York* v. *Federal Power Commission*, 361 U.S. 195.

lar Commission orders and remanded the proceedings to the Commission.[4]

The Commission subsequently instituted an area rate proceeding for South Louisiana and consolidated the remanded cases with that proceeding (R. 376). While denying motions of the consumer intervenors which would have required the producers to post security, the Commission issued an order advising the producers of their potential obligation to refund amounts collected in excess of those ultimately found to be proper under Section 7 of the Natural Gas Act (R. 395).[5] When it became apparent that

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[4] *United Gas Improvement Co.* v. *Federal Power Commission*, 283 F. 2d 817 (C.A. 9) certiorari denied *sub nom. Superior Oil Co.* v. *United Gas Improvement Co.* and *California Co.* v. *United Gas Improvement Co.*, 365 U.S. 879 and 881; *Public Service Commission of New York* v. *Federal Power Commission*, 287 F. 2d 146 (C.A.D.C.), certiorari denied *sub nom. Hope Natural Gas Co.* v. *Public Service Commission* and *Shell Oil Co.* v. *Public Service Commission*, 365 U.S. 880 and 882; *United Gas Improvement Co.* v. *Federal Power Commission*, 287 F. 2d 159 (C.A.10); *United Gas Improvement Co.* v. *Federal Power Commission*, 290 F. 2d 133 (C.A.5), certiorari denied *sub nom. Sun Oil Co.* v. *United Gas Improvement Co.*, 368 U.S. 823; and *United Gas Improvement Co.* v. *Federal Power Commission*, 290 F. 2d 147 (C.A.5), certiorari denied *sub nom. Superior Oil Co.* v. *United Gas Improvement Co.*, 366 U.S. 965.

[5] The particular case involving the present petitioner was *Texas Gas Transmission Corp., supra*, 22 FPC 378 and 657, reversed, *Public Service Commission of New York* v. *Federal Power Commission, supra*, 287 F. 2d 146 (C.A.D.C.), certiorari denied, 365 U.S. 880 and 882.

[6] The Courts of Appeals for the Third and Fifth Circuits dismissed as premature petitions to review that advisory order

decision in the area rate proceeding would necessarily be delayed, the Commission severed this group of applications and set them for hearing in a consolidated proceeding under Section 7 (R. 410).[7] The examiner ruled that the proper standard for determining the initial prices which would serve the public convenience and necessity was the general level of prices under contracts roughly contemporaneous with petitioners' and free of the infirmities which led the courts to disapprove the original grants of unconditioned certificates. Adopting this standard, he excluded as irrelevant to this issue voluminous cost evidence and other economic data tendered by petitioners which, in his view, would have converted the proceeding into "some 16 different individual producer cost-type cases" (R. 491, 496).

He concluded that the "in-line" price for sales in South Louisiana under 1957 and 1958 contracts was 18.5 cents per Mcf (plus 1.5 cents reimbursement for the Louisiana gas severance tax where applicable)

(*Shell Oil Co.* v. *Federal Power Commission*, C.A. 3 No. 14031 (Oct. 2, 1962); *Callery Properties, Inc., et al* v. *Federal Power Commission*, C.A. 5 Nos. 19563, 19622, 19653, 19663 (Sept. 20, 1963)).

[7] By the time the hearings commenced, many of the cases had been settled, and only 21 of the original 74 dockets remained outstanding. In the course of the hearings, eight additional dockets were settled, leaving only 13, involving nine producers, for decision. One producer accepted the Commission's order and withdrew its petition for review in the court below. *Kilroy Properties, Inc.* v. *Federal Power Commission*, C.A. 5 No. 21029 (March 31, 1963).

and ordered refunds of all amounts previously collected in excess of that price (R. 499-509, 515-527).[8]

The Commission affirmed the examiner (R. 549). Moreover, in order to forestall the filing of rate increases which might trigger "favored nations" clauses in a great many other contracts, the Commission ordered a moratorium on all price increases in excess of 23.55 cents per Mcf (including tax reimbursement) until July 1, 1967, or the final decision in the area rate proceeding, whichever is earlier (R. 574-579).

On review, the court below held that the Commission erred in refusing to consider the economic evidence proffered by the producers and in prescribing the temporary moratorium on rate increases. Although it sustained the Commission's authority to order refunds, the court ruled that such refunds are to be measured not by the initial price fixed in the certificate, but by a "just and reasonable" rate as ultimately determined in proceedings under Sections 4 and 5 of the Act.

Three petitions for certiorari have been filed upon behalf of the Commission[9] and local distributor con-

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[8] He also decided that the take-or-pay provisions of the sales contracts should be left as they were until completion of a pending rule-making proceeding on the subject (Docket R-199), at which time petitioners' contracts should be modified to conform to the decision therein, subject to a floor of 80% of the annual minimum quantities called for by the contracts. The court below held this condition not presently reviewable and it is not here in issue.

[9] *Federal Power Commission* v. *Callery Properties, Inc., et al.*, O.T. 1964, No. 756.

sumer representatives[10] for review of the rulings that the Commission erred in (1) conditioning the certificates upon the producer's acceptance of "in-line" prices and excluding cost and other economic evidence; (2) imposing a temporary moratorium on the filing of rate increases above a designated level; and (3) measuring refunds by reference to the certificate's initial price. The present petition seeks review of the court's ruling that the Commission had authority to order refunds, irrespective of their measure.

DISCUSSION

As we pointed out in seeking certiorari to review other aspects of this same judgment (No. 756, Pet. 14), the decision of the court below, insofar as it relates to refunds, is of limited importance since it is in terms confined to situations in which there has been a previous decree invalidating a Commission certificate. We suggested, however, that the question which we raised as to the proper measure of refunds (our question 3) did merit review in conjunction with the major questions (questions 1 and 2) also presented.[11]

Although we believe that the court below was quite correct in holding that the Commission was empow-

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[10] *United Gas Improvement Co., et al.* and *Public Service Commission of New York* v. *Callery Properties, Inc., et al.*, O.T. 1964, Nos. 671 and 678.

[11] These involved the validity of the "in-line" standard employed by the Commission in making a price determination and the Commission's power to condition the grant of a certificate upon a temporary moratorium on rate increases.

ered to order refunds in order to rectify its earlier error as determined in the course of prior judicial review, we acquiesce in a grant of the instant petition if this Court decides to grant review of question 3 as presented in the petition of the Federal Power Commission. Obviously the question of the Commission's power to order refunds in the situation presented by this case is closely related to the question which we have raised as to the proper measure of the refund obligation. If the one is reviewed, it would seem clearly appropriate to review the other as well.

Respectfully submitted.

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DECEMBER 1964.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

26 34,35

Nos. ~~714~~, 768, 769, and 776

OCEAN DRILLING & EXPLORATION COMPANY, J. R. FRANKEL, ET AL., J. RAY MCDERMOTT & CO., INC., THE SUPERIOR OIL COMPANY, *Petitioners*,

v.

FEDERAL POWER COMMISSION, PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, THE UNITED GAS IMPROVEMENT COMPANY, LONG ISLAND LIGHTING COMPANY, *Respondents*.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK IN OPPOSITION

QUESTION PRESENTED

Where, prior to completion of appeal proceedings challenging the Federal Power Commission's issuance of a certificate of public convenience and necessity, a natural gas producer commences service under the certificate, which later is held invalid on the ground that the initial price thereunder is out of line, does the Commission, on remand, have power to require refunds of the excess amounts collected by the producer under the invalid certificate?

STATEMENT

By orders issued September 4, 1958 and August 10, 1959, the Federal Power Commission, over the objection of the Public Service Commission of the State of New York and other consumer interests, granted unconditional certificates to a substantial number of natural gas producers, including the four petitioners here, authorizing them to commence the sale of natural gas from Louisiana fields at initial prices ranging from 21.4¢ to 23.8¢ per Mcf. On appeal, the Commission's actions were reversed and the several cases remanded.[1]

In the meantime, however, and notwithstanding the pendency of the appeals, the present petitioners commenced service under the unconditional certificates and collected the high initial price that was the basis for the legal attack on, and judicial invalidation of, the certificates. Following hearings on remand, the Commission determined that the maximum initial price at which these sales should have been certificated was 20¢ per Mcf, including 1.5¢ tax reimbursement where applicable, and, to give effect to this finding, it issued new certificates at that level and directed petitioners to refund all amounts in excess of 20¢ per Mcf which had been collected under the original, judicially invalidated certificates.

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[1] *Public Service Commission of New York* v. *F.P.C.*, 361 U.S. 195 (1959); *United Gas Improvement Co.* v. *F.P.C.*, 283 F. 2d 817 (9th Cir. 1960), *cert. denied*, 365 U.S. 879, 881 (1961); *Public Service Commission of New York* v. *F.P.C.*, 287 F. 2d 146 (D.C. Cir. 1960), *cert. denied*, 365 U.S. 880, 882 (1961); *United Gas Improvement Co.* v. *F.P.C.*, 287 F. 2d 159 (10th Cir. 1961); *United Gas Improvement Co.* v. *F.P.C.*, 290 F. 2d 133 (5th Cir. 1961), *cert. denied*, 368 U.S. 823 (1961); *United Gas Improvement Co.* v. *F.P.C.*, 290 F. 2d 147 (5th Cir. 1961), *cert. denied*, 366 U.S. 965 (1961).

On appeal by petitioners and other producers, the Court of Appeals for the Fifth Circuit, though reversing other aspects of the Commission's order,[2] held that, on remand, the Commission had power to require refunds of "the fruits obtained [by petitioners] under an invalid, that is illegal, order." *Callery Properties, Inc.* v. *F.P.C.*, 335 F.2d 1004 at 1019.

ARGUMENT

Although, for the reasons stated in its own petition for a writ of certiorari (O.T. 1964, No. 678, filed November 12, 1964), the Public Service Commission of the State of New York believes that the decision below urgently requires review and, indeed, summary reversal by this Court, it does not believe that the narrow aspect of the decision below presented by petitioners in Nos. 714, 768, 769, and 776 merits certiorari.

1. The issue raised by petitioners was rightly decided below.

a. The Commission's determination to require refunds of excess amounts was eminently correct, and was, in fact, required by this Court's landmark decision in *Atlantic Refining Co.* v. *Public Service Commission of New York* (*Catco*), 360 U.S. 378 (1959), in which the Commission's unconditional certification of a 21.4¢ Louisiana sale was struck down precisely because it would permit the producers to retain, without refund obligation, an out-of-line price during the "nigh interminable" period between initial certifica-

[2] The court's action in reversing the Commission is the subject of pending petitions for certiorari in *F.P.C.* v. *Callery Properties, Inc.*, O.T. 1964, No. 756; *Public Service Commission of New York* v. *Callery Properties, Inc.*, O.T. 1964, No. 678; *United Gas Improvement Co.* v. *Callery Properties, Inc.*, O.T. 1964, No. 671.

tion and the ultimate conclusion of a rate investigation. Here, where there has been a "nigh interminable" delay of four to five years between initial, invalid certification and lawful certification on remand, the producers nevertheless urge that, as a matter of law, they cannot be required to refund the excess amounts collected during this period. Acceptance of the producer position, however, would result in "a windfall for the natural gas company and a consequent squall for the consumers," 360 U.S. at 390, thereby frustrating the

> "overriding intent of the Congress to give full protective coverage to the consumer as to price." 360 U.S. at 389.

b. Not only are refunds necessary to meet the substantive requirements of the Act, as spelled out by this Court in *Catco, supra,* but they are necessary, as a remedial measure, to carry out the purpose of the reversal of the original, unlawful certificates and to assure that the petitioners in the earlier appeals will be made whole.

c. Wholly aside from the Commission's power on remand to correct the errors laid bare by the earlier appeals, the express conditioning power conferred by Section 7(e) of the Natural Gas Act[2] provides ample authority for the Commission to condition its issuance of the new certificates upon the applicants' refunding all excess amounts collected under the invalid certificates. See *F.P.C.* v. *Hunt,* 376 U.S. 515 at 521 (1964).

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[2] "The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require."

d. In electing to commence service at a time when the validity of their certificates was under attack, the present petitioners necessarily assumed the risk that the certificates might be rendered invalid. See *Virginia Petroleum Jobbers Ass'n* v. *F.P.C.*, 259 F.2d 921 at 927 (D.C. Cir. 1958). The producer contention that the consumer representatives, the successful petitioners in the earlier appeals, either could have or should have obtained a stay of the invalid certificates pending appeal is devoid of merit; no stay was available precisely because those petitioners, if successful, could be made whole through refunds on remand, *Id.*, 259 F.2d at 925-27.

2. There is no conflict between the decision below (insofar as it sustains the Commission's power to order refunds) and the decision of any other circuit or of this Court.

Although petitioners correctly cite *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246 (1951), and related cases[4] for the proposition that the Commission has no power, under Section 5 of the Act, to require refunds of excess amounts collected under a rate which has assumed finality, they overlook the fact that, as noted by the Commission at the very outset of these remanded proceedings (27 FPC 482 at 483, R. 411):

> "[The] unconditional certificate orders under Section 7 were erroneously issued in the first place and as a result of the invocation of Section 19 have never assumed finality."

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[4] *T.I.M.E.* v. *United States*, 359 U.S. 464 (1959); *F.P.C.* v. *Hope Natural Gas Co.*, 320 U.S. 591 (1944); *Hope Natural Gas Co.* v. *F.P.C.*, 134 F. 2d 287 (4th Cir. 1943).

Absent finality, of course, the filed-rate doctrine of *Montana-Dakota* has no applicability. See, *e.g.*, *Public Service Commission of New York* v. *F.P.C.*, 329 F.2d 242 at 249 (D.C. Cir. 1964), *cert. denied sub nom. Prado Oil & Gas Co.* v. *F.P.C.*, 377 U.S. 963 (1964);[5] *Pan American Petroleum Corp.* v. *Kansas-Nebraska Natural Gas Co.*, 297 F.2d 561 (8th Cir. 1962), *cert. denied*, 370 U.S. 937; *Cities Service Gas Co.* v. *Columbian Fuel Corp.*, 52 Del. 262, 155 A.2d 879 (1959).

CONCLUSION

In sustaining the Commission's power to order refunds of excess amounts, the decision below was eminently correct and presents no conflict with the decision of any other circuit. Accordingly, the petitions for a writ of certiorari should be denied.

Respectfully submitted,

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January 11, 1965

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[5] The arguments now presented by Ocean Drilling, petitioner in No. 714, are virtually identical with the arguments unsuccessfully pressed by Prado Oil & Gas Co. last term. See *Prado Oil & Gas Co.* v. *F.P.C.*, O.T. 1963, No. 987, petition pp. 8-10.

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IN THE

Supreme Court of the United States

October Term, 1965.

No. 21.

THE UNITED GAS IMPROVEMENT COMPANY, LONG ISLAND LIGHTING COMPANY, and PHILADELPHIA ELECTRIC COMPANY,

Petitioners,

v.

CALLERY PROPERTIES, INC., J. R. FRANKEL, MARGARET HUNT HILL, Trustee, J. RAY McDERMOTT & CO., INC., OCEAN DRILLING & EXPLORATION COMPANY, PLACID OIL CO., CAROLINE HUNT SANDS and LOYD B. SANDS, and THE SUPERIOR OIL COMPANY,

Respondents.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1965.

No. 21.

THE UNITED GAS IMPROVEMENT COMPANY, LONG ISLAND LIGHTING COMPANY, AND PHILADELPHIA ELECTRIC COMPANY,

Petitioners,

v.

CALLERY PROPERTIES, INC., J. R. FRANKEL, MARGARET HUNT HILL, TRUSTEE, J. RAY McDERMOTT & CO., INC., OCEAN DRILLING & EXPLORATION COMPANY, PLACID OIL CO., CAROLINE HUNT SANDS AND LOYD B. SANDS, AND THE SUPERIOR OIL COMPANY,

Respondents.

BRIEF FOR PETITIONERS, THE UNITED GAS IMPROVEMENT COMPANY, LONG ISLAND LIGHTING COMPANY, AND PHILADELPHIA ELECTRIC COMPANY.

OPINIONS BELOW.

The Opinion of the Court of Appeals for the Fifth Circuit (R. 619) is reported at 335 F. 2d 1004 (1964). The Opinions and Orders of the Federal Power Commission (herein called "Commission") reviewed by the Court of Appeals (R. 550-93, 607-17), are reported at 30 FPC 283 and 30 FPC 682 (1963). The Commission stated that it was "in almost complete accord with the decision of the presiding examiner" and concluded that the examiner's decision, with certain modifications, should "constitute the decision of the Commission" (R. 556). The examiner's decision (R. 491-541) is reported at 30 FPC 304 (1963).

JURISDICTION.

The judgment of the Court of Appeals was entered on August 14, 1964 (R. 643-44). The Petition for a Writ of Certiorari herein was filed on November 10, 1964 and was granted on March 8, 1965 (R. 645), 380 U. S. 931. At the same time Petitions for Writs of Certiorari filed by the Federal Power Commission and by the Public Service Commission of the State of New York, attacking the same judgment on similar grounds, were granted and the cases consolidated for argument (R. 646-47), 380 U. S. 931. The jurisdiction of this Court rests on 28 U. S. C. § 1254(1) and Section 19(b) of the Natural Gas Act, 15 U. S. C. § 717r(b).

STATUTES INVOLVED.

The statutory provisions involved are §§ 4, 5, 7, and 19(b) of the Natural Gas Act, 52 Stat. 822 (1938), as amended, 15 U. S. C. §§ 717c, 717d, 717f and 717r(b). These Sections are printed in Appendix "A," *infra*, pp. 1a through 6a.

QUESTIONS PRESENTED.

In 1954 this Court held that producer sales of natural gas in interstate commerce were subject to Commission regulation. *Phillips Petroleum Corp. v. Wisconsin,* 347 U. S. 672. In 1959 this Court held that when a producer application under § 7 for authority to make a new sale signals a situation not in the public interest—because the proposed price exceeds existing price levels or threatens to "trigger" price rises in other sales contracts—the Commission must, in the absence of a finding that the proposed rate is just and reasonable, either refuse to certificate the sale or issue a certificate conditioned to protect the consumer. *Atlantic Ref. Co. v. Public Service Comm'n,* 360 U. S. 378 (herein called *"Catco"*). In 1963 this Court held that the Commission might properly conclude that producer rate regulation could not be carried out by means of the separate examination of individual sale or producer costs, but instead upon an area basis. *Wisconsin v. FPC,* 373 U. S. 294. Pursuant to these decisions, the Commission is now engaged in a regulatory program whereby all cost, economic and other evidence bearing on the justness and reasonableness of rates for producer sales in a given area is heard and evaluated in comprehensive area rate proceedings under §§ 4 and 5 of the Act. At the same time, pending the promulgation of area rates, new sales by producers to a pipeline at higher than in-line prices are certificated under § 7 only if subject to refund and with appropriate safeguards against "triggering" area-wide price increases. The court below held that § 7 forbids the Commission to so divide its evidentiary investigation and to thus forestall triggering, but instead requires it to proceed on an individual sale, individual company basis, with the concomitant prolonged hearing of cost and economic evidence.

Therefore the questions presented are:

1. Does § 7 of the Natural Gas Act require the receipt in evidence of cost and economic evidence offered by appli-

cants which (a) is of the same type concurrently being received in an area rate proceeding involving the same applicants and sales and (b) has been examined as an offer of proof and found by the Commission to be of the same type as evidence rejected in earlier § 7 hearings as useless for initial price regulation and productive of administrative delay injurious to the consumer?

2. Does § 7 permit the Commission to condition the grant of a permanent certificate upon the applicant's reducing his contract initial rate to a rate no higher than the "in-line" price level for the area, thereby placing any subsequent increase above that level under a consumer-protective refund obligation?

3. Does § 7 permit the Commission to condition the grant of a permanent certificate upon the applicant's not filing under § 4 for rate increases above a level that would trigger a general price rise, until the Commission completes the determination of just and reasonable rates for the area?

4. Does § 7 permit the Commission, on remand of court-reversed grants of permanent certificates, to grant new permanent certificates conditioned upon the applicant's refunding the difference between the price ultimately authorized and the higher price collected under the invalid certificate?

STATEMENT OF THE CASE.

The Commission's decision is part of a viable and effective program of regulation, fair to producer and consumer alike, consistent with the needs of each, and adopted, after several false starts, pursuant to the direction of this and other Courts. The basic issue in the case is whether the Commission's decision was within its statutory authority.

The relevant facts are:

In June, 1957, the Commission, over consumer protest, issued unconditioned permanent certificates authorizing the *Catco* producers to begin a major new sale of natural gas in interstate commerce from fields located in off-shore Louisiana at an initial price of 21.4¢ per Mcf plus tax reimbursement. *Continental Oil Co.*, 17 FPC 880 (1957). This price was the highest ever contracted for in the area and was followed shortly by a general price rise for natural gas to the new high level. The consumer interest, represented by local distribution companies and State utility commissions, hotly contested these certificates and sought court relief. Two years later this Court unanimously held the Commission's action invalid. *Catco*, 360 U. S. 378. But in the period between the Commission's unconditioned certification of the *Catco* application in 1957 and this Court's decision in 1959, the Commission in six separate formal hearings, involving a total of 69 producers, followed its erroneous approach and issued to the present respondents and other producers unconditioned permanent certificates for South Louisiana sales at initial prices ranging from 21.4¢ per Mcf, where no tax reimbursement was due, to 23.8¢ per Mcf including tax reimbursement. Each order, however, was timely appealed by consumer representatives—one or more of petitioners in Nos. 21 and 22—to the Courts of Appeals for the Third, Fifth, Ninth, Tenth or D. C. Circuits under § 19 of the Act, and some ultimately to this Court. In each case the consumer position was vindicated, the unconditional permanent cer-

tificate nullified, and the case remanded to the Commission for further proceedings.[1]

Subsequently, by order issued March 7, 1962, the Commission consolidated all 69 of the remanded producers dockets, together with five related dockets, for further proceedings, 27 FPC 482; see also 27 FPC 15. In its order, the Commission noted (1) that six weeks earlier, in the remanded *Catco* dockets, it had found the in-line level in South Louisiana for those contracts to be 18.5¢ per Mcf, plus 1.5¢ tax reimbursement where applicable, and (2) that the present petitioners in Nos. 21 and 22 were urging that the remanded proceedings be disposed of, without further delay, on the basis of the *Catco* determination on remand. Though conceding that there was merit to this position, the Commission nonetheless concluded that it "should afford the producers further opportunity to be heard," 27 FPC at 485, and accordingly set the consolidated proceeding for hearing.[2] At the same time, it notified respondents of their potential refund liability (R. 398).

At the outset of the hearing, the producer-respondents sought to introduce what the examiner described as "a tremendous mass of cost-type, economic and financial evidence" which he found to be "defective" and of "no real probative value" (R. 495). On motion of certain of the intervenors, supported by the Commission staff, the examiner

1. The cases and the court reversals are listed in footnotes 4, 5 and 6 of the opinion of the court below (R. 621-22). While nine Justices of this Court and eleven judges of various courts of appeals found error in the Commission's approach, only one judge, dissenting, did not, and he ironically became the author of the opinion here under review.

2. Prior to the commencement of the remanded hearings conferences were held between a number of the producer applicants and the intervenors, and proposed settlements were entered into and submitted to the Commission for its approval, which was forthcoming on July 30, 1962, 28 FPC 247. Although these settlements covered the bulk of the remanded applications, some producers—including respondents here—were unwilling to accept the settlement terms, and a hearing on their remanded applications was held before a presiding examiner on June 18-21, 1962.

ruled that such evidence was inadmissible. The examiner, however, received in evidence the producers' non-cost data showing the prices for all gas contracts in South Louisiana and the prices at which certifications were currently in effect (R. 208-28; Exh. X-42, R. 286-99).

Following the submission of briefs, the examiner on December 7, 1962, issued his decision (R. 491-540) in which he (1) reaffirmed his exclusionary ruling (R. 495-99); (2) concluded that the in-line price for the contracts here involved was 18.5¢ per Mcf, plus 1.5¢ per Mcf tax reimbursement where applicable (R. 499-509); and (3) directed that the producers refund, with interest, all amounts previously collected under the invalid and illegally issued certificates in excess of the appropriate in-line levels of 20.0¢ per Mcf or 18.5¢ per Mcf (R. 514-27).[3]

On exceptions to the examiner's decision filed by various parties, the Commission, in Opinion 398 issued July 17, 1963, affirmed and adopted the examiner's decision, though modifying it in certain respects (R. 556). And, based upon its findings that any rate filing to levels in excess of 23.55¢ per Mcf would cause widespread "triggering" of contract prices throughout South Louisiana, the Commission held that it would condition permanent certificates for contracts which called for increased prices above 23.55¢ per Mcf upon the applicant's not filing for increases above 23.55¢ per Mcf until July 1, 1967, or until the conclusion of the pending South Louisiana Area Rate Proceeding, Docket No. AR61-2, whichever is earlier. Applications for rehearing

3. The Commission's decision in the Permian Basin area rate case (Docket AR61-1, Op. 468 issued August 5, 1965) found a national replacement cost of gas of 16.5 cents per Mcf based on 1960 data found to be representative. Even adjusting for the difference in State taxes (1.3¢ per Mcf higher onshore Louisiana than in Texas) and pressure bases (14.65 and 15.025 psia in Texas and Louisiana, respectively), this equates to a price of less than 18.5¢ onshore Louisiana. But since the gas involved in this case is flowing under contracts dated before January 1, 1961, the ceiling price for this gas would be even lower under principles established in Op. 468, which reserve the incentive premium for gas committed after that date.

were filed, and on September 11, 1963, the Commission denied rehearing (R. 606-17).

Callery Properties, Inc. and the seven other producer-respondents here, appealed to the Court of Appeals for the Fifth Circuit. The United Gas Improvement Company, Long Island Lighting Company and Philadelphia Electric Company,[4] Petitioners in No. 21 and the Public Service Commission of New York, Petitioner in No. 22 were permitted to intervene. That court on August 14, 1964, reversed the Commission. First, it held that the Commission erred in excluding cost-type evidence. Despite the Commission's clear holding that such evidence would cause § 7 proceedings to bog down and become full dress § 4 or § 5 rate hearings and was not useful, in any event, in determining the public-convenience-and-necessity initial price in § 7 proceedings, the court below nevertheless held that such extensive evidence would have to be accepted. In so ruling, the court made no reference to the holding in *Wisconsin v. FPC*, 373 U. S. 294, that the Commission need not proceed in rate cases on the basis of individual company costs, or the fact that other cost and trend evidence was at the time of decision being heard in a lengthy area rate proceeding (Docket AR61-2) involving the very area—South Louisiana—and covering the very producers in the present case.

4. Under an agreement with the City of Philadelphia, The United Gas Improvement Company operates the municipally-owned Philadelphia Gas Works and related facilities, distributing 1035 Btu natural gas to some 600,000 customers in the City of Philadelphia. It also distributes gas to some 205,000 customers in other parts of Pennsylvania. Long Island Lighting Company, a public utility organized under the Transportation Corporation Law of the State of New York, distributes natural gas to some 361,000 customers in an area of 1,230 square miles on Long Island, New York. Philadelphia Electric Company, a public utility organized under the laws of the Commonwealth of Pennsylvania, distributes natural gas to some 240,000 customers in Delaware, Chester, Montgomery, Bucks and Lancaster Counties, Pennsylvania. All three distributors purchase substantial quantities of natural gas for resale from Transcontinental Gas Pipe Line Corporation and other pipelines which in turn purchase substantial quantities of gas from producers in South Louisiana.

Second, the court held that the Commission had no power by condition to impose a limited moratorium on the producers' exercise of their contract right to file rate increases above 23.55¢ until July 1, 1967, or the conclusion of AR61-2 (in which Commission staff and intervenor evidence supports a just and reasonable rate well below the in-line level found by the Commission herein). This holding was despite the unreversed Commission finding that any filing above 23.55¢ would trigger rate increases under other contracts. Finally, the court held that the Commission had the power to order refunds, but that the refunds could not be ordered down to the appropriate initial price level. Rather, it geared refunds to an as yet undetermined just and reasonable level, in the unlikely event that that level should turn out to be higher than the initial price level.

Petitioners sought review in this Court and certiorari was granted.

SUMMARY OF ARGUMENT.

Rate proceedings under §§ 4 and 5 of the Natural Gas Act have proved to be intricate and lengthy. Pending the determination of just and reasonable rate levels in area proceedings now in progress, the expeditious certification of new sales under § 7 of the Act, either by permanent or temporary certificates, consistent with full consumer protection, has become a crucial focus of the Commission's regulatory duties. In a series of major § 7 proceedings the Commission has followed the same regulatory approach used in the present case. Most of these cases are not final and would have to be retried if the several holdings of the court below were permitted to stand. These proceedings are summarized in Appendix "C" to this brief.

The decision of the Commission here under review, which conditioned permanent certificates to applicants upon a reduction of initial price to in-line field price levels and left investigation of cost and economic justification for contract rates to the concurrent area rate proceeding, was a reasonable exercise of its discretion and was in accord with consistent Commission regulatory policy approved by a number of courts of appeals; an earlier contrasting Commission policy of refusing to scrutinize initial price levels had been consistently reversed by the courts of appeals and this Court.

The decision of the court below, by calling for a plenary evidentiary hearing for all applications under § 7, has the inevitable effect of relegating the exigent initial regulatory act to an *ex parte* temporary certification procedure. The expeditious grant of certificates is required if pipelines are to obtain the gas to support their expansion programs. The Commission's present approach, condemned by the court below, accommodates the needs of each segment of the industry, while at the same time safeguard-

ing the legitimate interests of producers and consumers. Under this approach, producer-applicants can accept certificates calling for in-line prices and then file under § 4 of the Act for their contract prices. The higher prices, collected subject to refund, are open to justification in area rate proceedings. If the court below is sustained, the pipeline requirement for expedition will force resort to a form of *ex parte* temporary certification. The mischievous results of an *ex parte* approach have been noted by this Court. *FPC v. Hunt*, 376 U. S. 515.

The "in-line" level found by the Commission to be the proper level for conditioning the applicant's certificates, while hardly on the "low side," as called for by *Atlantic Ref. Co. v. FPC*, 316 F. 2d 677 (D. C. Cir. 1963), was supported by substantial evidence of record. The Commission's order therefore should be affirmed by this Court without the further delay injurious to the consumer which might be occasioned by a remand to the court below.

The procedural delays in the present case have required the Commission to protect the consumer by ordering refunds of excesses collected above the lawful public-convenience-and-necessity level. In so ordering, the Commission acted in accord with this Court's strictures in *Catco*, 360 U. S. 378, and in a manner consistent with its customary practice in ordering refunds of excesses above lawful rates. This practice has been affirmed by the Courts of Appeals. *Shell Oil Co. v. FPC*, 334 F. 2d 1002 (3rd Cir. 1964); *Hunt Oil Co. v. FPC*, 334 F. 2d 474 (5th Cir. 1964).

In accord with this Court's statement that the "triggering" of area-wide increases through the activation of "favored nation" clauses and other indefinite price escalation provisions was contrary to the public interest, *Catco*, 360 U. S. 378, at 391, the Commission below correctly conditioned applicant's certificates to forestall such triggering in South Louisiana pending completion of the concurrent area rate proceeding for that area. In so acting, the

Commission exercised its statutory authority confirmed by this Court in *FPC v. Hunt*, 376 U. S. 515, in the context of temporary certification. The court below improperly limited the *Hunt* case by distinguishing between the criteria for a temporary and for permanent certification. Neither the Act nor this Court makes such a distinction, and the reversal of the Commission on this ground should, in turn, be reversed.

ARGUMENT.

The Commission Actions to Achieve Effective Regulation and Consumer Protection Were Within the Administrative Discretion Conferred Upon It by the Natural Gas Act.

The Commission below held that any permanent certificate issued to the producer-respondents herein must be conditioned upon the charging of a price for these South Louisiana sales which did not exceed the going price for other like sales in the same area executed at approximately the same time. In so holding, the Commission affirmed the exclusion of a mass of cost and economic evidence. In the course of his opinion below, Judge Brown, for the Court of Appeals stated in his footnote 30:

> "For all we know, had the Commission received the proffered evidence, it would have held it to be wanting and that might well have been the end of the matter." (R. 632)

Ironically, the Commission did just that. Exceptions were taken to the examiner's exclusionary ruling; all the excluded evidence was a part of the record in the form of offers of proof under the Commission's rules; the Commission stated (R. 556) that it had made a "review of the record;" clearly it considered "the proffered evidence" and found it "wanting."

This action by the Commission was in line with and, in fact, compelled by an impressive series of clear decisions passing upon the certification of South Louisiana sales. See cases cited *infra*, pp. 25-26. Examination of the history of producer initial price regulation under the Natural Gas Act shows that the Commission's holding was not novel; moreover, it was necessary and well within the authority granted the Commission by the Act.

A. The Two Approaches to Initial Price Regulation: "SIGNAL" and "Deferred Regulation"

Phillips Petroleum Co., 10 FPC 246 (1951) was an investigation of a natural gas producer's rates under § 5 of the Natural Gas Act. When this Court in *Phillips Petroleum Corp. v. Wisconsin*, 347 U. S. 672, reversed the Commission's conclusion that it lacked jurisdiction to regulate Phillips' rates, the focus of regulatory attention was upon the justness and reasonableness of the existing rate structure of natural gas producers who sold to pipelines for resale in interstate commerce. The investigation dealt with the cost of gas already flowing in interstate commerce. However, the Natural Gas Act, also provides in § 7 that no natural gas company "shall engage in the . . . sale of natural gas . . . unless there is in force with respect to such natural gas company a certificate of public convenience and necessity issued by the Commission . . . ." Therefore, under the logical extension of this Court's holding in *Phillips*, natural gas producers were required to obtain certificates for their new sales in interstate commerce to pipelines upon terms which comported with the public convenience and necessity.

Under the structure of the Natural Gas Act rate investigations under § 5, using the just and reasonable standard, provide for prospective adjustment in rates only. Therefore, if a producer obtains a permanent certificate under § 7 for a sale at the contract price fixed by the seller and the buyer, that price remains in effect until lowered prospectively under § 5, regardless of whether or not it exceeds the just and reasonable rate. When, after *Phillips*, it became apparent that rate investigations under § 5(a), such as that for Phillips, would involve lengthy hearings, consumer protection required that the focus on rates be shifted to the time of the initial entry of gas into the interstate market. If a gas sale were permanently certificated at a price level higher than ultimately found to be just and

reasonable, the producer would receive a windfall, since the Act provides no mechanism for recovering overcharges. *Catco*, 360 U. S. at 389-90.

By 1965 the Commission has only just found definitive just and reasonable rates for the first producing area, the Permian Basin of West Texas and New Mexico. When other pending area rate proceedings (those for Southern Louisiana, the Texas Gulf Coast and the Hugoton-Anadarko areas) are completed, just and reasonable rates will have been established for about 75% of the natural gas sold in interstate commerce. The Southern Louisiana proceeding is in the terminal hearing stage and the other proceedings are in the initial hearing stage. Thus the continuation of an effective hold-the-line approach in certificate cases is essential.

The history of the past eleven years since *Phillips* shows that pending the definitive establishment of just and reasonable rates there are only two approaches to producer regulation of initial contract prices possible under § 7 of the Act.[5] The Commission has used both at different times and the courts have passed upon both, approving one and rejecting the other. One approach, the first to be used by the Commission, *Cities Service Gas Co.*, 14 FPC 134 (1955),

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5. The Commission's Statement of General Policy, SGP61-1, issued concurrently with its *Phillips* decision, 24 FPC 537 (1960) and the start of the area system of regulation, has served as an expediting standard for administering the first approach to initial price regulation, described hereinafter. The Statement of General Policy set forth, *inter alia*, "guide-line" levels for initial rates for the 23 various areas of gas production. The Commission stated that these "guide line" or "ceiling" level were based on "all data available" to the Commission, including cost and field price data. In practical effect, as first promulgated the "ceilings" generally reflected the highest levels attained by field prices in the various areas. After hearing on the issue of initial price, the Commission has generally found the proper public convenience and necessity price to be *lower* than the guide line (which, for example, is 21.25¢ including tax for South Louisiana). In the absence of contest, however, the Commission will certificate sales either temporarily or permanently at initial prices at or below the "guide-line" ceiling levels.

involves the technique of comparing proposed initial prices with the prevailing level of prices in the area of the proposed sale. Where the price of the proposed sale conforms to the prevailing level, a permanent certificate is issued. Where it exceeds the prevailing level, a permanent certificate is issued only upon the condition that the initial price be reduced to the prevailing level.[6] Upon receiving a certificate with the price so reduced, the producer may then file for any permissible rate increase under § 4(e) of the Act, which permits the Commission to suspend effectiveness of the rate increase and permit its collection subject, however, to refund and an eventual rate investigation. This approach permitted fairly prompt disposition of certificate applications. The use of this approach by the Commission was early affirmed in the court of appeals. *Signal Oil & Gas Co. v. FPC*, 238 F. 2d 771 (3rd Cir. 1956), *cert. denied*, 353 U. S. 923. This first approach may be termed, for brevity, the "*Signal* approach."

The second approach, and the one initially followed in all the dockets involved in the present case was to certificate unconditionally any proposed sale of gas, even though the proposed price substantially exceeded prevailing prices, and to rely upon the prospective-only rate adjusting powers granted by § 5 of the Act. This facile approach made for even greater apparent speed in the disposition of producer certificate applications, since basically no investigation was required by the Commission. But this approach was rejected by the courts because of the delays incident to § 5(a) cases and the consequent damage to consumers in their inability to recover past overcharges. In the celebrated *Catco* case the Commission at first used the conditioning (the *Signal*) approach, *Continental Oil Co.*, 17 FPC 732 (1957), but upon representation by the producers that unless they received unconditioned permanent certificates

6. The "going" price may be presumed to be one acceptable to a representative section of the industry, while the insertion of a condition invokes refund protection for the consumer.

they would refuse their gas to the interstate market, the Commission resorted to its second approach, 17 FPC 880, which for brevity may be called the "deferred regulation approach".

Perhaps because of the apparent administrative ease of this deferred regulation approach it was soon elevated to a rule of law governing the bulk of certificate proceedings, including all of those involving the present respondents. The Commission's action amounted in effect to an abdication or at least an indefinite postponement of regulation. See R. 17; 23-24; 132-37; compare R. 145-52; see also 20 FPC at 298.

B. The "Deferred Regulation Phase" of the Present Case.

Looking at the history briefly recounted above it is obvious that had the Commission followed consistently its approach in the *Signal* case initial prices in all areas including South Louisiana would have been conditioned initially at 1954-56 levels.[7] Further rate increases which *arguendo* might be called for by the financial requirements of the industry would then have been sought solely under § 4 of the Act, which provides for suspension of increased rates and refund protection for the consumer. A hearing under § 4, possibly consolidated with one under § 5, would have provided a forum for the presentation of any evidence relevant to the justness and reasonableness of rates. It is not impossible that such a regulatory scheme could have whetted the desire of producers for speedy determination of such rate proceedings in order to eliminate refund obligations and secure finally the higher prices to which they have consistently contended they are entitled.

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7. In Louisiana the weighted average price at the wellhead for all sales in interstate commerce was 9.7¢ per Mcf in 1954. *Sales by Producers of Natural Gas to Natural Gas Pipeline Companies*, 1961, 1963, pp. 5, 8. There were very few new sales at substantially higher prices.

Unfortunately, the results were otherwise, particularly in South Louisiana, where well-head price inflation was most exaggerated. A newly constituted Commission in 1956-59 took a rather different view of § 7 from that of the majority in *Signal*. By this time it was necessarily clear to producers that final rate decisions under Sections 4 and 5 would be long delayed, and this cannot have been a wholly unwelcome prospect because of the nonrefundable dollars collected during the pendency of the proceedings. Thus, a premium was placed upon obtaining as soon as possible a permanent certificate under § 7 at the highest price possible. Once permanently certificated, the high price could be collected, regardless of its justness and reasonableness under Sections 4 and 5, until a proceeding under those Sections was completed—a prospect which seemed unlikely before a half or more of the duration of those 20 year contracts had elapsed.

The present case is a direct product of the deferred regulation policy of the then-Commission, which had the unfortunate effect of making a regulatory statute the goad for exaggerated inflation. While this policy was in effect, prices, particularly in South Louisiana, rose and nearly doubled the 1954 level.[8] As each successive application at a new high came before the Commission it was certificated unconditionally at whatever initial price was set forth in the sales contract.

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8. The Fifth Circuit noted in one of the earlier appeals herein, that in 1954 pipelines were able to contract for new supplies of gas in South Louisiana at initial prices in the area of 12¢, *United Gas Improvement Co. v. FPC*, 290 F. 2d 133, at 136 (5th Cir. 1961). In the Fall of 1955, prices leaped to 17-18¢ when the Commission unconditionally certificated new sales to Transcontinental Gas Pipe Line at 16¢ plus 1¢ tax reimbursement, *A. J. Tamborello*, 14 FPC 123, and to Tennessee Gas Transmission Company at 17¢ plus 1¢ tax reimbursement, *Alabama-Tennessee Natural Gas Co.*, 14 FPC 986 at 992-94. The final leap, to 21½¢ plus 2¢ tax reimbursement, was precipitated by the Commission's June 1957 *Catco* order, but was set aside by this Court in *Catco*, 360 U. S. 378, and *Transco-Seaboard*, 361 U. S. 195, and by the courts of appeals in the subsequent UGI-New York Commission cases.

The present case is significant because it is the first case to reach this Court in which the Commission has returned to the proper *Signal* approach.[9] Unfortunately, this return to *Signal* first principles was not finally made until some four years after the original § 7 hearings in which the Commission decided to defer price considerations to vaguely promised future § 5 proceedings. The controversy herein arises essentially because at the outset of the hearing on remand the producer-respondents sought to offer in evidence a "tremendous mass of cost-type, economic, and financial evidence—consisting of approximately 70 exhibits and the testimony of 35 witnesses" (R. 495).

C. Recent History of the SIGNAL Approach: SKELLY.

The controversy is one of general importance. Following the series of reversals by the courts of appeals in these matters, discussed at p. 18, *supra,* the Commission returned, as it belatedly realized it must, to the *Signal* approach. During 1961 and 1962, the Commission had occasion to consider the initial price question in a number of varying cases: first, the *Catco* dockets on remand from this Court and, additionally, a number of cases which had not reached final decision by the Commission or in which rehearing of a deferred regulation approach had been ordered. Without at first drawing hard and fast rules as to the standard of proof required to demonstrate the public convenience and necessity the Commission on a case-by-case basis considered and disposed of whatever evidence might have been presented in all these cases. The cases, the type of evidence presented in them and the Commission's decisions on this evidence are set out in greater detail in Appendix "B" of this brief. The result of this Commission experience, first,

9. The remanded *Catco* case, in which a *Signal* approach was also applied, was settled after decision by the Commission. See 28 FPC 1090 (1962). This Court refused to review the subsequent *"Skelly"* decision, *Public Service Comm'n v. FPC,* 329 F. 2d 242 (D. C. Cir. 1964), *cert. denied sub nom. Prado Oil & Gas Co. v. FPC,* 377 U. S. 963.

confirmed the administrative soundness of the *Signal* approach, second, demonstrated the uselessness of cost and economic trend evidence, and, finally, revealed the interminable delay which would ensue if such evidence were generally permitted in the record.

In August, 1962, in *Skelly Oil Co.*, 28 FPC 401, the Commission, based upon experience gained in the preceding two years, took the occasion to formulate general rules as to the standard of proof in these interim initial price cases. The specific applications before the Commission involved sales from the southern part of the Texas Gulf Coast, but the issues raised were generally applicable in all initial rate cases. Therefore, the Commission, on the basis of its extensive regulatory experience to that time, held "in strong and unequivocal terms, that economic and financial evidence is generally not to be regarded as germane in resolving the initial price question in producer certificate cases" (R. 497). This major decision of the Commission was affirmed by the Court of Appeals for the District of Columbia in *Public Service Comm'n. v. FPC*, 329 F. 2d 242 (D. C. Cir. 1964), *cert. denied sub nom. Prado Oil & Gas Co. v. FPC*, 377 U. S. 963 (herein called *"Skelly"*). Since *Skelly*, the Commission has consistently applied what now may be called the *Signal-Skelly* approach in numerous cases. For convenience these are set forth and summarized in Appendix "C".

D. The "SIGNAL-SKELLY Phase" of the Present Case.

In the present case the Commission adopted the examiner's conclusion that the offered evidence:

> ". . . may be characterized roughly as falling generally into three basic categories, as follows:
>
> "1) *Cost of service studies* of various types. It may be noted that substantial portions of this evidence were defective in that they employed methods and techniques inconsistent with those

previously adopted by the Commission in *Phillips*, Op. No. 338, and CATCO, Op. No. 351.

"2) A number of *discounted cash flow studies*, similar to the one rejected by the Commission in CATCO, Op. No. 351.

"3) *Economic trend data studies* of various types, setting forth data related to drilling trends and costs, data related to supply, demand, revenues and profits, and market trend data.

"Certain of these studies were identical in nature with similar studies which the Commission in the *El Paso* certificate case, *El Paso Natural Gas Co., et al.*, Op. No. 358 (June 11, 1962), found to have 'no real probative value.'" (R. 556, 495) (footnote omitted)

The examiner refused to accept such evidence, both on the broad policy ground of the *Signal-Skelly* approach to initial price regulation and on the technical ground that the particular evidence as presented was "defective" (R. 495). His ruling was sustained by the Commission. The Commission adopted the following articulation by the Examiner of the *Signal-Skelly* approach:

"If this mountain of cost-type, economic and financial evidence had been received in the instant proceeding the instant hearing would, in effect, have amounted to the trial of some 16 different individual producer cost-type cases, and the decisional process required would have involved, in effect, the writing of some 16 different individual producer rate decisions. Any such proceeding would plainly have amounted to an administrative monstrosity. It would obviously have been completely contrary to the objectives emphasized in the Commission's instant order of March 7, 1962, *i.e.*, to obtain a prompt determination of the initial price question (and of the refund obligations of the producer applicants), by a limited proceeding on the basis of

> the 'ground rules' already established by the Commission in CATCO, Op. No. 351. In addition, any such procedure would have been completely inconsistent with the Commission's clearly expressed policy determination that producers rates are hereafter to be tried and decided on an area basis, rather than on an individual producer cost basis." (R. 556, 496) (footnote omitted)

Moreover, the Commission after "review of the record" (R. 556), adopted the examiner's specific reliance on the general principles laid down in the *Skelly* case. The examiner had noted that subsequent to his own ruling excluding cost-type, economic and financial evidence,

> ". . . The entire problem has been squarely resolved by the Commission in *Skelly* . . .", (R. 497)

and quoted at length from the *Skelly* opinion.

Thus the central issue in the present case is the proper administration of § 7 of the Natural Gas Act. It will be shown below that in its opinion here under review the Commission did not abuse its discretion in applying the *Signal-Skelly* approach, the history of which has just been outlined.

II.

THE PROPER EXERCISE OF THE COMMISSION'S POWER UNDER § 7 OF THE NATURAL GAS ACT.

A. The Scope of the Commission's Power Under § 7.

Section 7(c) of the Natural Gas Act provides:

> "No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or ac-

quire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations."

Section 7(e) provides:

"a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity."

And, additionally, § 7(e) provides:

"The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require."

The present case involves the effect to be given these provisions in regulating applications by producers-respondents to sell gas in interstate commerce from wells located in South Louisiana. The initial prices proposed for these sales were among the highest prices proposed for South Louisiana at the time certification was sought. Certain of the sales had the potential to trigger very substantial rate increases in existing contracts between one purchasing pipeline, Transcontinental Gas Pipe Line, and other producers supplying Transcontinental throughout South Louisiana.

Such triggering in fact took place in 1959 (R. 439-40), and consumers six years later are still paying resulting higher prices.

It has been established as the result of extensive litigation before the Commission and in the Courts of Appeals that the Commission must give such proposed prices careful scrutiny, *Catco,* 360 U. S. 378, at 391; must make "a real administrative effort to hold back prices", *Public Service Comm'n v. FPC,* 287 F. 2d 146, 150 (D. C. Cir. 1960), and has full power to impose a condition upon the issuance of certification reducing the initial rate. *Signal Oil & Gas Co. v. FPC,* 238 F. 2d 771 (3rd Cir. 1956), *cert. denied,* 353 U. S. 923; *Texaco Inc. v. FPC,* 290 F. 2d 149 (5th Cir. 1961). It has also been held that the Natural Gas Act confers on the Commission power to impose such a conditioned rate on the basis of a record containing only evidence of comparative field prices, where such evidence shows that the proposed price exceeds the general level of prices being negotiated at the time in the area. *Texaco Inc. v. FPC, supra; Skelly,* 329 F. 2d 242 (D. C. Cir. 1964).[10]

The appellate courts, preeminently in this Court's decision in *Catco,* have made increasingly clear the nature of the proceeding by which the Commission must carry out its responsibility under § 7. Either in reversing the Commission for failure to adopt a *Signal* approach, or in affirming its adoption of such an approach, they have been unanimous

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10. Given such power, had the FPC in 1957 and 1958 conditioned the certificates issued to the respondents herein to a level of 18.5¢ per Mcf plus 1.5¢ reimbursement for state taxes upon the records then existing in these cases, such an order would have been valid under the Natural Gas Act and, if appealed, would certainly have been affirmed by the courts of appeals. *Compare Texaco Inc. v. FPC, supra, with United Gas Improvement Co. v. FPC,* 290 F. 2d 133 (5th Cir. 1961), *cert. denied,* 368 U. S. 823. Of course, the Commission did not use its conditioning power when these proceedings were intitially before it. But this error on the part of the Commission, subsequently reversed, cannot place the respondents in a better position than they would have been in had the Commission acted properly in the first place.

in their requirements until the decision here under review. In *Catco* this Court said:

> "Where the application on its face or on presentation of evidence signals the existence of a situation that probably would not be in the public interest, a permanent certificate should not be issued." 360 U. S. at 391.

In *United Gas Improvement Company v. FPC,* 283 F. 2d 817 (9th Cir. 1960) the court said at 823:

> "In our view, however, a determination of relevancy for comparative purposes does not require examination into factors such as relative production costs which are not reflected in specific terms of the contracts. If this were required to implement the 'hold the line' technique, the procedure would assume much of the complexity of a rate adjudication. This would tend to defeat the objective of providing simple, direct and effective stopgap protection for the consuming public."

The Fifth Circuit itself in *Texaco Inc. v. FPC,* 290 F. 2d 149 (5th Cir. 1961) said at 157:

> ". . . [A] section 7 proceeding is not to be equated with a proceeding under section 4 or section 5 to determine a just and reasonable rate. The power and duty of the Commission . . . may be discharged by it without the elaborate and detailed proofs required in a section 4 or section 5 proceeding. We find that the record before the Commission meets the requirements of a section 7 determination . . ."

In *California Oil Co. v. FPC,* 315 F. 2d 652 (10th Cir. 1963) the Court of Appeals for the 10th Circuit, after quoting from the *United Gas Improvement Company* case cited above, stated at 659-60:

> ". . . [W]e also have serious doubts as to whether any of the costs or delivery services urged by Petitioner to sustain the initial price of 18.5 cents are rele-

> vant at all in determining the 'in line' price in a Section 7 proceeding. . . . We do not think that the Commission was required in this case to consider the exploration and drilling costs or cost of delivery services in arriving at the 'in line' price in a certification proceeding. The consideration of these matters may properly be left to a Section 4 proceeding."

Finally in *Skelly*, 329 F. 2d 242 (D. C. Cir. 1964), the Court of Appeals rejected the producer argument that they had a right to consideration of certain types of evidence under § 7. The court said at 246-47:

> "The standards of Sections 4 and 5 are not those to be used in conditioning a certificate issued under Section 7; otherwise the purpose of *Catco* to avoid the consequences of the well nigh interminable proceedings incident to a rate case would be defeated . . . consideration of the proffered evidence was not essential."

The nature and scope of § 7 proceedings which emerges from a consideration of these and other cases is unmistakable. While the courts do not limit the type and extent of evidence which the Commission may hear if it so decides, they clearly confirm its power to dispose of all issues arising under § 7 on the basis of a *Signal-Skelly* approach.

In *Skelly* the Court of Appeals went on to say:

> ". . . [W]e need not hold that the Commission may never consider such evidence if the circumstances in a particular case move it to do so consistently with its obligation under *Catco*." (p. 247)

This Court in *Catco* held that the Commission was not required to determine the justness and reasonableness of a proposed rate in the certificate proceeding. At the same time, the strong implication of the opinion is that the Commission lacked *power* to certificate an out-of-line price

absent a supportable finding that the price was just and reasonable.[11]

The corollary of *Catco* is not that the Act consequently confers on every applicant a right to a hearing under § 7 in which it may, if possible, prove that its proposed price is just and reasonable. Rather, the stress in *Catco* was on the use of the Commission's conditioning power to protect the consumer. Therefore, while the Commission may, if it chooses and the interest of the consumer is not jeopardized, examine justness and reasonableness under § 7, it clearly has authority under the Act to assign such rate matters to a separate rate case and to use its conditioning powers as an interim method of consumer protection. To suggest, as did the court below, that by means of undetailed "resourceful ingenuity" and undefined "administrative inventiveness" (R. 631-32) the Commission could have prevented the admission of the evidence proffered here from bogging this certificate case down into a full-dress rate hearing is totally unsupported and, as experience has shown, totally unrealistic.

The discretion as to the proper evidentiary forum must lie with the regulatory Commission, whose duty is the protection of the consumer as well as the producers, and not exclusively with the producer-applicant. The effective holding of the court below was to place this discretion in the hands of respondents and others similarly situated. The issue presented by this present case is not, therefore, the one articulated by the court below—the proper quantam and type of evidence admissible in a § 7 hearing.[12] The

11. See also *Oklahoma Natural Gas Co. v. FPC*, 257 F. 2d 634 at 652-53 (dissenting opinion), *cert. granted*, 358 U. S. 877, *cert. dismissed on petitioner's allegation of mootness*, 358 U. S. 948.

12. Such a controversy would lead this Court and the courts of appeals into a time consuming and fruitless exegesis of the rules of evidence. It would require them, as the Commission was required to do in this case, to study bulky technical exhibits (see e.g. R. 267-360) in order to weigh their substance, relevance and materiality. Obviously this is a job for the Commission and its examiners, not for the courts.

issue here is rather the much more far-reaching one discussed above of the proper approach to total regulation under the Natural Gas Act.

For a number of years and through a number of proceedings the Commission examined and considered many various types of evidence presented by applicants under § 7 (see Appendix "B" *infra*). It ultimately concluded that when such so-called economic and cost evidence was fragmentary in nature, it was obviously unrepresentative and of no use. On the other hand a full presentation of such evidence would be duplicative of the proceeding in the cognate area rate case.

B. The Decision Below Would Mark a Return to Inadequate Consumer Protection Under § 7.

After this Court and the courts of appeals reversed the Commission's policy of issuing unconditioned certificates upon inadequate records there followed, as discussed above, a period of hesitation and confusion in the Commission's actions. Hearings on certificate applications which had not as yet culminated in Commission opinions were set for rehearing or reopened for further evidence. See cases cited in Appendix "B". The various dockets remanded by the courts were consolidated with area rate proceedings and allowed to "ride along" with those proceedings for ultimate decisions which were obviously to be long delayed.

However, producer-applicants still desired to put their gas on the market and pipelines sought to purchase. To permit this immediate flow of gas pending the delays and confusions described above the Commission began to rely more and more upon that part of § 7(c) of the Act which permits the issuance of "a temporary certificate in cases of emergency . . .".[13] Such certificates had the advantage from the point of view of sheer speed of processing (though hardly from that of consumer protection) of being

13. See 1963 FPC ANNUAL REPORT, pp. 128-29.

issued *ex parte* without notice or hearing.[14] This practice contained the latent potential for permitting the Commission to carry out the very policy of unconditioned certification which the courts had universally condemned in the area of permanent certification. It had the added "advantage" for purposes of supposed expedition that consumer representatives had no notice of the action until after it was taken. A consumer representative finally came upon one of these *ex parte* certificates within the statutory 30-day period, § 19(b), and appealed it. The Commission's power was upheld,—though only upon a theory that the action, being purely provisional, was subject to necessary adjustment at the time of permanent certification. *Public Service Comm'n. v. FPC*, 327 F. 2d 893 (D. C. Cir. 1964).

Given this court-approved "emergency" practice,[15] it becomes obvious that the problem which concerned this Court in *Catco* would, if the decision of the court below were to prevail, be perpetuated in only slightly altered guise—but a guise far more deadly to the consumer interest. Thus, if in a hearing for a permanent certificate evidence of the sort offered herein below, but not received in evidence, is now to be heard, cross-examined and rebutted, § 7 proceedings will become as "nigh interminable" as the rate proceedings discussed in *Catco*—indeed they will necessarily be rate hearings of the sort discussed in that case (see R. 496). At the same time producers could be

14. This Court is familiar with and has condemned the process. *FPC v. Hunt*, 376 U. S. 515.

15. Although § 7(e) of the Act uses the word "emergency" without exegesis, the Commission has since 1956 distinguished sharply between those "emergencies" justifying the issuance of temporary certificates to pipelines on the one hand and to producers on the other. The facts compelling issuance of a temporary certificate to a pipeline generally fall within the more usual meaning of the word "emergency". See *Algonquin Gas Transmission Corp. v. FPC*, 201 F. 2d 334 (1st Cir. 1953). In contrast, the Commission's regulations permit issuance of temporary certificates to producer-applicants on the basis of unsupported allegations of conditions that amount to no more than normal business exigencies, such as the necessity to pay shut-in royalties and to flare gas. See, *Public Service Comm'n v. FPC*, 327 F. 2d 893 (D. C. Cir. 1964).

collecting their full contract rates, unjustified, under temporary certificates subject at best only to refund protection and that, apparently, only upon certain contingent equities. *Skelly*, 329 F. 2d at 250.

On the other hand, if the Commission should condition such temporary certificates, it would have to do so on some such "arithmetic" basis as Judge Brown deprecates in his opinion below, or the goal of expedition would necessarily be lost. Judge Brown himself, speaking for the Fifth Circuit in *Hunt v. FPC*, 306 F. 2d 334, 339-40 (5th Cir. 1962), *rev'd on other grounds*, 376 U. S. 515, has refused to upset such an approach to conditioning temporary certificates. Thus the Opinion below inevitably relegates the crucial consumer protective regulatory act to an *ex parte* procedure from which consumer representatives are barred. Clearly, the Natural Gas Act does not require this result reached by the court below.

III.

THE PROPER CONDITIONING LEVEL.

The court below declined (R. 641) to pass upon the Commission's findings as to the going price level for South Louisiana at which a consumer-protective condition in the applicant's certificate might be made. The issue was ripe for decision by the court below and no party contended that further evidence as to field prices was called for by the record. Indeed, sufficient evidence of this kind had been in the record in the first stage of the *Transco-Seaboard* and *Hope* cases (R. 398).

The Commission, Petitioner to this Court in No. 24, has stated in its Petition for a Writ of Certiorari that it will argue the propriety of the Commission's "in-line" holding and the Commission is clearly the proper party to make such an argument in detail. Therefore it need only be pointed out here that the law in the area and the record in the present case fully support a summary affirmance of the Commission by this Court on the "in-line" issue.

The standards governing appellate review of a discretionary finding such as the Commission's in-line finding below are clearly set forth by various courts of appeals. If the finding is supported by the evidence of record then the court cannot substitute its own judgment for that of the Commission. In *California Oil Co. v. FPC*, 315 F. 2d 652 (10th Cir. 1963), the court held:

> "Here, the Commission issued a conditional certificate requiring a lower initial sale price. Therefore, our review of the order in question is confined to a determination, from the record, of whether the prescribing of such condition is supported by soundly based findings, or, stated in another way, whether it is supported by substantial evidence when measured by the foregoing standards." (p. 657)

In *Atlantic Ref. Co. v. FPC*, 316 F. 2d 677 (D. C. Cir. 1963), the court held:

> "Considering the record as a whole we are not able to say that the Commission abused its discretion in conditioning the certificates of convenience and necessity in this case." (p. 680)

Similarly in *Skelly:*

> ". . . [S]ince the data relied upon adequately supports the price condition of the permanent certificates such condition is approved." (329 F. 2d at 247)

The evidence relied on by the Commission herein and summarized in the examiner's decision (R. 499-509) supported the Commission's determination of an in-line price of 18.5¢ per Mcf plus 1.5¢ tax reimbursement where applicable. The area for exercise of the Commission's discretion was particularly limited in the case of the present applications, which were near contemporaries of the *Catco* sales. The Commission had only recently and at great length evaluated the evidence of going prices in South Louisiana in *Continental Oil Co.*, 27 FPC 96 (1962) (*Catco*-on-remand). In

the present case therefore it was not evaluating data new or unfamiliar to its expertise but rather examining the narrower question of whether the present record required any departure from the *Catco* decision.

Thus under the criteria laid down by the courts of appeals the determination of the Commission below as to the proper in-line price was rational and based on substantial evidence of record. This Court may find that the conclusion reached was within the Commission discretion. By now exercising its power to so hold, this Court may provide the consumer at once the protection which has been awaited since 1958-59 and which the Commission below properly sought to provide.

IV. In Order to Carry Out the Mandate of the Several Courts of Appeals Reversing Unconditional Certification, the Commission Was Required, on Remand, to Correct Its Earlier Error by Requiring Refunds, With Interest, of Excess Amounts Collected Pursuant to the Invalid, Judicially Reversed, Certificates.

Following the Commission's original unconditional certificates in September 1958 and August 1959, timely review proceedings, challenging the initial price level, were instituted by one or more of the present Petitioners. Even though those review proceedings were pending the producers, nevertheless, began their sales at the 23.55¢ prices. For the most part, these sales began during 1959, so that by the time the Commission decided the remanded proceedings, in mid-1963, the producers had been collecting their out-of-line prices for some four years while the invalidity of the underlying certificates had been declared by the courts for some three. In all instances, the effect of these increased prices had been passed on by the pipeline purchasers to their customers.

Accordingly, when the Commission determined, in the order now under review, that the appropriate in-line price was 20¢ and that permanent certification should be conditioned upon the filing of an initial price of 20¢, it also

concluded, as indeed it was obligated to, that its original certifications in 1958 and 1959 should have been conditioned at the in-line level of 20¢ and that the amounts which the producers had collected pursuant to the judicially reversed certificates in excess of that level should be refunded, together with appropriate interest.

That result was the whole point of the original appeals and of the reversals—which were predicated upon the proposition that the Commission had failed to exercise its regulatory authority over these sales and was being given a second chance to do so. In *Catco* this Court held that Congress intended, in enacting the Natural Gas Act, to provide a *complete, permanent,* and *effective* bond of protection for the consumer. 360 U. S. at 388. It is equally clear that this bond of protection was intended to be effective "from the time the gas first enters interstate commerce." *Atlantic Ref. Co. v. FPC,* 316 F. 2d 677, 679 (D. C. Cir. 1963). This Court reversed the Commission in *Catco* expressly because the unconditioned certification of the out-of-line price, though subject to prospective reduction after a subsequent § 5 rate hearing, would, since "without the protection of refund," 360 U. S. at 390, confer a windfall on the producer to the detriment of the consumer. If the producers were nevertheless permitted to retain the excessive prices collected under the invalidated certificates the decisions of this Court and the courts of appeals in these initial price cases would be rendered largely hortatory.

The court below properly recognized these principles (R. 638-39). However, it substituted its own "equitable" standard of consumer protection for that of the Commission by "open ending" the producers' refund obligation. While the Commission's findings in the Permian Basin area rate case indicate that the just and reasonable rate which the court below would use as the basis for measuring refunds will be well below 20¢ per Mcf (see p. 7, *supra*), the fact of delay in requiring refund is a detriment

to consumers, *FPC v. Tennessee Gas Transmission Co.*, 371 U. S. 145, 154-55, and thus presents a balancing consideration. Since, as noted in footnote 10, *supra*, producer-respondents should now be in no better position than they would have been had the Commission acted correctly when the matter first arose, the refund required down to the 20¢ level is an appropriate remedy.

The *sua sponte* substitution of a regulatory scheme of its own devising was error on the part of the court below. *FPC v. Colorado Interstate Gas Co.*, 348 U. S. 492. Moreover, the standard used by the Commission in this case was reasonable and the one uniformly used by the Commission, whether dealing with invalid rate filings under § 4(e), *Shell Oil Co.*, 29 FPC 472 (1963), *aff'd sub nom. Shell Oil Co. v. FPC*, 334 F. 2d 1002, 1008 (3rd Cir. 1964), invalid permanent certificates on court remand, *Continental Oil Co.*, 27 FPC 96 (1962) (*Catco*-on-remand); *Socony Mobil Oil Co.*, 27 FPC 347 (1962), or temporary certificates, *Hunt Oil Co. v. FPC*, 334 F. 2d 474 (5th Cir. 1964). In these cases the criterion of justness and reasonableness has not been considered relevant to the issue.

The effect of the court's decision making justness and reasonableness of rates a criterion in ordering refunds would inevitably be either to turn all certificate proceedings into rate hearings or to defer the ordering of refunds until the conclusion of subsequently instituted rate hearings. Either result would effectively lessen the bond of protection which refunds offer the consumer. *FPC v. Tennessee Gas Transmission Co.*, 371 U. S. 145, 154-55. Finally, the ordering of interest was necessary to prevent unjust enrichment and to effectuate the purposes of the Act. *Texaco Inc. v. FPC*, 290 F. 2d 149, 157 (5th Cir. 1961).

V. The Commission Had Power to Impose a Limited Moratorium to Prevent Triggering.

In *Catco* this Court said:

> "Where the proposed price is not in keeping with the public interest because . . . its approval might

> result in a triggering of general price rises . . . the Commission in the exercise of its discretion might attach such conditions as it believes necessary." (360 U. S. at 391)

In this connection the Commission herein found:

> "An examination of the applicable contracts to Transco, Hope and United reveals that triggering and price redeterminations will take place at a price in excess of 23.55 cents per Mcf." (R. 578; compare R. 439-40)

The Commission therefore imposed as a condition to certification a limited moratorium on rate filings above 23.55¢ per Mcf—until July 7, 1967 or the completion of the South Louisiana Area Rate proceeding, whichever is earlier.

The condition thus imposed was far less sweeping than the one upheld by this Court in *FPC v. Hunt*, 376 U. S. 515. Moreover its purpose was more limited. The condition in *Hunt* was designed to freeze the *status quo* pending a hearing and decision on permanent certification regardless of the time it might take. The present condition, in contrast, was limited in duration, did not preclude all resort to § 4(e) but only if the price was above 23.55¢ per Mcf and was designed only to preclude a specific and serious threat to consumer interest—triggering of indefinite escalation clauses—which this Court has frequently recognized. *E.g., Catco*, 360 U. S. 378; *FPC v. Texaco Inc.*, 377 U. S. 33.

The power of the Commission to impose such a reasonable condition was squarely upheld by this Court in the very recent case of *FPC v. Hunt, supra*. This Court there clearly elucidated the interrelationship of §§ 7 and 4 of the Natural Gas Act, and a reargument of the issue would be superfluous here. The court below attempted to distinguish the *Hunt* decision on the basis of what it misconstrued to be a distinction made by this Court between conditioning temporary and permanent certificates. The language of the Act makes no such distinction, nor did this Court. The rationale of the *Hunt* case would apply with even greater

force to permanent certification, where any injury permitted to the consumer interest can only be remedied under § 5, which contains no refund mechanism.[16]

CONCLUSION.

For the foregoing reasons it is urged that the opinion of the court below be reversed and the orders of the Commission herein be affirmed in all particulars.

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16. The importance of the refund of part or all of a triggering rate has been expressly recognized by the Commission. In an order issued November 19, 1963 in *Texaco Inc.*, 30 FPC 1316, it held that rates triggered by the new levels erroneously approved in *Transco-Seaboard* (see R. 439-40) were subject to retroactive adjustment only to the extent that the triggering rate was so adjusted by refund. Review of this ruling is pending in *United Gas Improvement Co. v. FPC*, CADC No. 18339.

APPENDIX A.

RATES AND CHARGES; SCHEDULES; SUSPENSION OF NEW RATES.

SEC. 4. (a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

* * *

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulations, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, State commission, or gas distributing company or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing

and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

FIXING RATE AND CHARGES; DETERMINATION OF COST OF PRODUCTION OR TRANSPORTATION.

SEC. 5. (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State,

municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however,* That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural-gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural-gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

(b) The Commission upon its own motion, or upon the request of any State commission, whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transportation of natural gas by a natural-gas company in cases where the Commission has no authority to establish a rate governing the transportation or sale of such natural gas.

* * *

EXTENSION OF FACILITES; ABANDONMENT OF SERVICE.

* * *

(c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of

any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however,* That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on the effective date of this amendatory Act, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after the effective date of this amendatory Act. Pending the determination of any such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest.

* * *

(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall

be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.

* * *

REHEARING: COURT REVIEW OF ORDERS.

Sec. 19 . . .

(b) Any party to a proceeding under this act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein the natural gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28,

United States Code. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in [former] sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, sec. 1254).

APPENDIX B.

"In-Line" Cases (1962-63) Evaluating Cost, Economic and Other Evidence.

In 1962 and 1963 the Commission considered the various types of cost and economic evidence presented in a number of "in-line" cases involving various areas. The following cases all involved applications for certificates of public convenience and necessity under § 7 of the Natural Gas Act. In each the Commission, after receiving the cost and economic evidence and examining it, found it of no aid and therefore conditioned certificates upon a lower initial price on the basis of field price evidence:

Continental Oil Co., 27 FPC 96 (1962) (*Catco*-on-remand). In this remanded *Catco* case the applicants introduced considerable cost evidence. The Commission found the evidence, while extensive, to be incomplete and useful only for rough comparative purposes. It said:

> "It is clear enough that the cost of service evidence here is not complete as presented by any of the parties. In the first place the evidence relates to Continental alone and not to the other Catco companies. Furthermore, it combines Continental's production costs for the Cameron area leases with Continental's system-wide exploration costs. While the incomplete nature of the evidence makes it impossible to make a definite finding as to cost of service, it does provide a basis of comparison with the field prices which may assist us in determining whether the proposed initial price meets the standards of the Act." (p. 103)

Socony Mobil Oil Company, Inc., 27 FPC 347 (1962). This decision involved one of the dockets remanded by this Court in *Transco-Seaboard*, 361 U. S. 195. The type of

evidence presented by applicants and found inadequate by the Commission is indicated by the following:

> "Finally, Socony presented historical cost evidence purporting to show a direct allocated unit cost of 30.79 cents per Mcf for this High Island gas alone. Socony filed no brief and has not attempted to expound a proper policy which might utilize such cost data, even were we to accept Socony's calculations. In our judgment, it is not feasible to use the cost figures adduced by Socony in redetermining this case. The results of attempting to determine 'costs' for each field are too well known to bear extended discussion. As staff points out the ratio of intangible drilling costs, presented by Socony for the 7 productive High Island wells, to the reserve estimates for the pools in which these wells are completed vary from 1 cent per Mcf to 89 cents per Mcf. A system of regulation based on field-by-field cost studies would unduly depress prices in 'bonanza' fields—upon which the public heavily relies—and approve excessive prices for marginal production.
>
> "Our regulation of producers teaches us that costs should be considered only for aggregates large enough to reflect representative conditions of properties. We cannot, here, find the estimated High Island reserves of some 50 million Mcf sufficiently large to give High Island costs any significance standing alone. Since Socony has made no attempt to demonstrate that its isolated cost experience at High Island is representative of experience for other properties, other operators and significant volumes of production in the area, we cannot soundly give any weight whatever to its 'cost' showing, and we need not do so. See *Covington & Lexington Turnpike Co. v. Sanford,* 164 U. S. 578, 596; *San Diego Land & Town Co. v. Jasper,* 189 U. S. 439; *Baltimore & Ohio Rail Road Co. v. United States,* 345 U. S. 146." (p. 348)

Michigan Wisconsin Pipe Line Co., 27 FPC 449 (1962). This case involved sales from Northwest Oklahoma. The applicants presented considerable geological and cost evidence as summarized in the Examiner's decision, 27 FPC at 476-77. The Commission found:

> "Although the parties have gone to great lengths to justify the proposed initial price on the basis of comparative cost evidence and evidence to show the geological, operating and marketing characteristics of the Woodward area in relation to the Laverne area, this evidence is not of such compelling nature as to convince us that we should depart from the pricing pattern established in the Policy Statement by ordering either an adjustment in price or in area boundaries on the basis of the record in this individual certificate proceeding." (p. 454)

The Ohio Oil Company, 27 FPC 551 (1962), *aff'd sub nom. Atlantic Refining Co. v. FPC*, 316 F. 2d 677 (D. C. Cir. 1963). The applications in this case involved sales in North Louisiana. The Commission analyzed the evidence presented as follows:

> "There is no evidence in the record to justify the 18.5 cent prices on the basis of costs. No conclusion whatever can be drawn from Hunt Oil Company's fragmentary 'economic study' of its two production units involved herein, which purports to show costs of about 7 cents per Mcf for one unit and about $5.80 per Mcf for the other (now abandoned). The inferences made by Hunt from the proceedings in Docket No. G-9554, et al. and Docket No. G-9065, et al. are unwarranted since neither case considered the costs of the sales herein. The applicants' evidence as to increasing risks in North Louisiana was general in nature and cannot be translated into a specific level or range of costs for these sales." (p. 552)

The Commission's refusal to consider this economic and cost evidence was affirmed by the Court of Appeals.

El Paso Natural Gas Co., 27 FPC 1134 (1962). The sales involved in this proceeding were from fields in Southwestern Wyoming to El Paso Natural Gas Company. Producer applicants introduced extensive economic and trend evidence. Much of it was identical in nature with evidence presented but rejected in the present proceeding (R. 556, 495). The Commission analyzed this evidence at length and concluded that for initial price purposes it had "no real probative value". The Commission said:

> "To justify their proposed contract price in this proceeding, the producers have presented an economic study which purports to show the reasonable financial requirements of the industry. This economic evidence consists of charts and tables setting forth certain supply, demand, cost, revenue, and market price trends based on data compiled from the Census of Mineral Industries, United States Bureau of Mines, Mineral year book, and various trade publications for (1) the entire United States; (2) the States of Colorado, Montana, Utah and Wyoming; (3) the States of Kansas, New Mexico, Oklahoma, and Texas; and (4) a combination of the eight named western states.
>
> "The producers' witness, in presenting the foregoing evidence, stated that costs incurred by the producers for the specific supplies committed to El Paso in this proceeding are meaningless for the purpose of testing the appropriateness of the initial price, and that the appropriate price must be determined on the basis of the financial requirements of the industry as related to certain trends on an area basis. In his opinion, however, industry revenue requirements cannot be related to area prices except through the mechanics of the competitive market system. Thus the producers take the position that because the trends

presented show a decline in productivity per foot drilled, an increase in cost of production, and a decline in the ratio of new supply to net production, present gas prices are not high enough to furnish producers with the incentive to find, develop, produce and market sufficient quantities of gas to meet consumer demand; and that prices should be allowed to increase until they are high enough to bring forth the supplies needed to equal demand and the foregoing trends are reversed.

"Under the theory advanced by the producers, the economic evidence presented could be used to justify any price which might be thought to be required as an incentive to bring adequate supplies of new gas to the interstate market, and which has been negotiated at arm's length in a competitive market. To accept the producers' contract price on this theory of regulation would be tantamount to an abdication of our regulatory responsibility under the Natural Gas Act. As stated by the Court of Appeals for the Fifth Circuit in *U. G. I. v. F. P. C., supra,* '. . . the only justification for giving the Commission the duty to regulate prices was the determination by Congress that the producers have a supply that is so restricted in relation to demand that they have the economic power to bargain for prices that will be injurious to the public.' To preside over a rising spiral of prices as dictated by competition in the open market and the trends associated with that market is to forego regulation of producer prices in the public interest, and would hardly be consistent with that 'real administrative effort to hold back prices' which the Supreme Court of the United States has demanded of us. See *P. S. C. v. F. P. C., supra.*

"The evidence presented by the producers in this proceeding offers no substantial, let alone compelling, proof of the public's need to have the gas supplies here

involved certificated for sale at the proposed contract price, or any initial price in excess of the in-line price of 15.384 cents per Mcf. The evidence does not show that the 15.384-cent price is inadequate to stimulate continued exploration and development of new reserves in Wyoming. The trends portrayed in the economic study presented by the producers do not necessarily bespeak the necessity for us to provide an increased incentive for exploration and development in the Wyoming Area or more particularly in the Green River Basin of southwest Wyoming where the gas in this case is being produced. As noted before, the gas purchased by El Paso in southwest Wyoming is delivered to markets served by its Pacific Northwest pipeline. However, no evidence as to the demand for gas in these markets has been presented, nor is there a showing that the development of new reserves to serve these markets is not progressing at a rate sufficient to meet the present or future needs of the area. On the other hand there is evidence to show that price levels in the four Mountain States have been adequate consistently to call forth new reserves which are more than double the production of the region; and that El Paso is apparently satisfied that exploration in this area is going along as well as can be expected.

"With respect to the use of trend evidence, it is impossible to draw any easy conclusions as to what particular trends may mean in terms of price. Thus a trend which shows reserves increasing at a declining rate in relation to the demand for gas does not require a conclusion that there is insufficient price incentive and profit potential. Exploration and development may well be continuing at a reasonable pace, even though the discovery of new reserves may appear to lag behind the demand for additional gas. Furthermore, any judgment with respect to the rate of exploration and development since 1954, as indicated by historical

trends, must be tempered by the understanding that such trends reflect in some degree past uncertainty among producers as to the course which producer regulation would take after the Supreme Court's decision in the Phillips case.

"The trend evidence presented by the producers in this proceeding is not sufficient to permit us to draw any conclusions therefrom with respect to the initial contract price here proposed. Without some substantial proof of how this general economic data, applicable to the industry as a whole over wide geographical areas, can be related to and utilized in support of the specific price proposed for these sales in this particular area, such evidence has no real probative value." (pp. 1137-38) (footnotes omitted)

Standard Oil Company of Calif., 27 FPC 353 (1962), *aff'd sub nom., California Oil Co. v. FPC*, 315 F. 2d 652 (10th Cir. 1963).

This case involved sales from newly developed fields in Utah to El Paso Natural Gas Co. At the hearing intervenors representing California consumers urged to the Examiner that the Natural Gas Act requires as a matter of law that the applicants introduce "some evidence as to the costs incurred in the production of the Red wash gas . . ." 27 FPC 1171-72. The Examiner held: "evidence of producer costs has never been held by the courts to be necessary to the determination of initial prices consonant with the public convenience and necessity." The California intervenors excepted to this ruling of the Examiner, 27 FPC 1156, but the Commission denied the exception. This ruling was affirmed by the Court of Appeals. The Commission's action in rejecting this evidence was affirmed by the Court of Appeals which held:

"We do not think that the Commission was required in this case to consider the exploration and drilling costs or the cost of delivery services in arriving at the

'in line' price in a certification proceeding." 315 F. 2d at 660.

Transwestern Pipeline Company, 28 FPC 109 (1962). This case is one of particular interest. It involved proposed sales from the West Texas-Permian Basin area and the Panhandle-Hugoton area to Transwestern Pipeline Company. On August 10, 1959 the Commission issued certificates to the producers involved in this case conditioned upon a lower initial price. However, by order on rehearing issued September 23, 1959, the Commission concluded:

> ". . . that the producers should be given the opportunity at an early date in proceedings supplemental to these certificate proceedings, to introduce such further evidence as they deem desirable in the light of the *Catco* decision, including evidence of costs, to show that their proposed initial contract prices meet the test of the public convenience and necessity." 22 FPC at 544.

Further proceedings were held which concluded with the opinion reported at 28 FPC 109. The type of evidence introduced by the applicants at the reopened proceedings is summarized by the Examiner as follows:

> "Acting upon petitions for review of orders of the Federal Power Commission the Court of Appeals for the Fifth Circuit in *Texaco, Inc. v. Federal Power Commission,* 1961, 290 F. 2d 149, 157 said 'The power and duty of the Commission to give' most careful scrutiny and reasonable reaction to initial price proposals of producers 'may be discharged by it without the elaborate and detailed proofs required in a Section 4 or Section 5 proceeding.'
>
> "The producers herein went to great lengths to justify their proposed initial prices by comparing their sales to Transwestern with the Laverne Field sale by

Socony Mobil to Michigan Wisconsin, by evidence intended to show the level of the conditioned prices would reduce the drilling incentive necessary to develop the various fields in the areas, by evidence of expenses for purchasing, holding, exploring and developing lease holdings in the several areas, by evidence tending to show an 'engineering test of cost' (Richardson & Bass, G-16137), by evidence tending to show the cost of an average well to develop a cash flow rate of return, by evidence tending to show increased costs and the need for higher prices to induce further exploration and development, and by evidence to show a company-wide cost-of-service study by Gulf. This evidence having been carefully considered, is not of such a compelling nature as to convince this Examiner, by a preponderance of the evidence, the public convenience and necessity requires these sales at a price level higher than that to which they were conditioned by the Commission, except in the single instance of the sale by Warren from its Sitter Plant hereinabove considered. The prices as conditioned by the Commission were based upon and reasonably related to, except in G-16030, prevailing prices for wellhead sales of pipeline quality gas as theretofore certificated by the Commission." (p. 124)

The Commission found that its original decision conditioning the certificates was unaffected by the evidence introduced by the applicants, stating:

"We find that a large part of the evidence subsequently submitted was cumulative and constituted little more than a restatement of evidence presented and considered in the initial proceeding. The evidence brought forth does not convince the Commission that the public convenience and necessity requires initial prices different from those set forth in our original order upon which the certificates issued said producers were conditioned." (p. 112)

Finally in the leading case of *Skelly Oil Co.*, 28 FPC 401 (1962), discussed at length in the text of this brief, the Commission examined the extensive cost type evidence placed in the record by certain of the applicants and concluded that it could give such evidence no weight at all in reaching its finding as to the proper initial price required by the public convenience and necessity. It said:

> "As already indicated Texaco and Continental have introduced additional economic and financial evidence to justify their proposed prices of 16.4965 cents and 16 cents respectively. Texaco's evidence is designed to show the replacement cost of the gas which it sells. It presents industry-wide cost trends and also data on the costs of replacing gas consumed for the United States as a whole and for the Texas Gulf Coast area, using a variety of statistical sources and employing a number of estimates based on judgment. To some extent the results depend on the future demand for gas, for Texaco introduces a factor so as to include not only the cost of replacing the present gas consumed but also additional gas necessary to meet future needs. Thus under Texaco's theory the present consumer would, in effect, be burdened not only with the cost of the already-discovered gas he now consumes, plus at least some of the cost of replacing it, but also with costs associated with the discovery of additional volumes of gas based upon future demand trends. From the country-wide and area-wide data Texaco then attempts to draw similar conclusions with respect to its own financial needs by comparing its exploration and drilling costs with the industry figures.
>
> "In support of its presentation Texaco quotes the *Phillips* case[21] which states in effect that our ultimate objective will be the determination of fair prices for gas based on the reasonable financial requirements of

21. 24 FPC 537, 547.

the industry. It argues that by 'reasonable financial requirements' we mean the revenues required by the producing industry from sales of natural gas in order to provide funds sufficient to search for, develop and produce gas supplies adequate to meet the continuing demands of the public for gas. In our opinion these observations and Texaco's evidence are not germane to this certificate proceeding. The principal criterion that should be employed here is whether the proposed prices were 'in line' at the time of contract execution as required by the Supreme Court's *CATCO* opinion.[22] Texaco's observations and evidence may have an important bearing on determinations to be reached in an area rate proceeding, or might be relevant in an individual company rate case although they fall short of showing Texaco's costs. However, we do not think it necessary or appropriate in a certificate proceeding to consider evidence of area costs or financial requirements, or of individual company costs or financial requirements. Any such approach is of limited utility[23] and leads to complicated, long-drawn-out proceedings, detrimental to the public.

"Questions concerning the cost of replacing present reserves, and more particularly whether such costs should be borne by present customers or by venture capital are not questions to be decided in a section 7 certificate proceeding. Rather, they are central questions to be decided in area rate proceedings.

"We therefore hold that cost of service and financial requirements evidence normally is not relevant in producer certificate cases and that the initial price in such proceedings shall be determined by the 'in line' price in the area at the time the producer contract in

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22. *Atlantic Refining Co. v. P. S. C.*, 360 U. S. 378.

23. See *Continental Oil Co., et al.*, 27 FPC 96, Opinion No. 351, Docket No. G-11024, *et al.*, issued January 22, 1962.

issue was executed and by our guideline ceiling price for the area. We do not mean to foreclose the possibility that a producer may present compelling circumstances in a particular proceeding to justify a higher price, but we wish to emphasize that with the guidelines herein established the price issue in certificate cases should be handled expeditiously and that before any evidence which would customarily be presented in establishing a just and reasonable rate can be admitted in evidence, a convincing showing must be made that such evidence is essential to the just disposition of the price question.

"Obviously, we cannot permit every individual certificate case to be converted into a full-blown rate case; the proof in this proceeding demonstrates the lack of utility of a limited cost of service presentation. The evidence does not show the cost of present reserves and consequently does not indicate the price necessary to cover such costs and provide a return which will attract sufficient risk capital to undertake the exploration and development necessary to replace present gas reserves.[24] More generally, the evidence does not demonstrate the 'financial requirements' of Texaco or the other producers in this proceeding, for the relation of individual needs to those of the industry in the country as a whole or in the area is not shown by the limited comparisons made. To correct those defects would require a complete rate case, which we have found not warranted in a certificate proceeding.

"Continental strives to support its 16-cent price in the Javelina Field by reference to its evidence showing that from 1946 to 1963 it would spend more than twice as much as it had realized or would realize. In fact, it

24. Compare *Panhandle Eastern Pipe Line Co. v. F. P. C.*, 305 F. 2d 763 (CADC, June 30, 1962), No. 16583 where in a rate case the court upheld the Commission in refusing to base rates on field prices or hypothetical development costs.

said it would have to receive $2.78 per Mcf in order to recoup its cash outlay. Apart from the question of the type of evidence appropriate in a certificate proceeding such narrowly limited cost data would not form a proper basis for appraising financial requirements. See *Socony Mobil Oil Company*, 27 FPC 347, Docket No. G-13780, February 9, 1962." (original footnotes included) (pp. 410-12)

The Commission's approach here was affirmed by the Court of Appeals, *Public Service Comm'n v. FPC*, 329 F. 2d 242 (D. C. Cir. 1964), *cert. denied* 377 U. S. 963.

As previously noted, Judge Brown in his opinion herein stated in his footnote 30:

> "For all we know the Commission received the proffered evidence, it would have held it to be wanting and that might well have been the end of the matter." (R. 632)

Ironically, the Commission did just that. Exceptions were taken to the examiner's exclusionary ruling; all the excluded evidence was a part of the record in the form of offers of proof under the Commission's rules; the Commission stated (R. 556) that it had made a "review of the record;" clearly it considered "the proffered evidence" and found it "wanting." In *Skelly* the producer evidence was formally admitted in evidence but was given no weight at all by the Commission in reaching its administrative decision because of insufficiencies of the sort enumerated in the numerous cases cited above. No doubt considerations of the same sort guided the Commission's determination to affirm rather than overrule the examiner's exclusion of certain evidence herein. Therefore, the unmistakable purport of Judge Brown's holding is that the Commission must now go through the sheer formality of receiving such nonprobative evidence and putting Staff and intervenors to the unnecessary expense and delay of rebuttal and cross-examination, but need give it no weight if, as its extensive

experience indicates, such evidence is not useful in administering interim initial price regulation. In an earlier decision, *Hunt Oil Co. v. FPC*, 306 F. 2d 359 (5th Cir. 1962), Judge Brown stated correctly that: "What the Natural Gas Act does not need is nit picking decisions on little picayunish points . . ." (p. 361). Yet the narrow evidentiary holding of the court below appears to be in practical substance nothing more than such a "picayunish" formality, while its potential adverse impact on § 7 regulation under the Natural Gas Act could be enormous out of all proportion.

APPENDIX C.

Cases Decided Since "Skelly" Applying a "Signal-Skelly" Approach.

The following cases, excluding the case here under review, have been decided by the Commission following its landmark *Skelly* opinion. In each the Commission has conditioned the issuance of a permanent certificate to a producer applicant upon the reduction of initial rate to an "in line" level. In most cases the Commission, following *Skelly*, excluded cost-type evidence from the record. In many of these cases appeals are pending in various courts of appeals challenging this action by the Commission; the geographical areas involved in the cases are indicated in parenthesis following the citation.

Texaco-Seaboard Inc., 29 FPC 593 (1963) (Texas Railroad Commission Districts Nos. 2, 3 and 4).

Jake L. Hamon, 29 FPC 784 (1963), *aff'd per curiam*, CADC No. 17922, et al., Feb. 11, 1964 (unreported) *cert. denied*, 377 U. S. 963 (Texas R. R. Dist. No. 4).

El Paso Natural Gas Co., 29 FPC 1175 (1963) (Panhandle Area, Oklahoma; Panhandle Area, Texas).

United Gas Pipe Line Co., 30 FPC 329 (1963), *appeal dismissed per curiam, sub nom. Gulf Oil Corp. v. FPC*, 330 F. 2d 824 (5th Cir. 1964) (South Louisiana).

Hassie Hunt Trust (Operator), 30 FPC 1438 (1963), *appeal pending sub nom. Margaret Hunt Hill, Trustee, v. FPC*, CA 5, No. 21886 (in abeyance pending decision of present case) (Texas R. R. Dists. Nos. 2 and 3).

Amerada Petroleum Corp., 31 FPC 623 (1964), *appeals pending sub nom. Sunray DX Oil Co. v. FPC*, CA 10, Nos. 7781, *et al.* (Texas R. R. Dist. No. 4).

Shell Oil Co. (Operator), Opinion 434, July 6, 1964, *appeals pending sub nom. California v. FPC*, CA 9, No. 19647, *et al.* (Arizona).

Union Texas Petroleum, Opinion 436, July 23, 1964 *appeals pending sub nom. Pan American Petroleum Corp. v. FPC*, CA 10, No. 7912, *et al.* (South Louisiana).

Sun Oil Company, Opinion 445, Oct. 26, 1964, *appeals pending sub nom. General American Oil Company of Texas v. FPC*, CA 5, No. 22259 (Mississippi).

Edwin L. Cox, Opinion 446, Nov. 17, 1964 (State of Oklahoma, other than Panhandle and Carter-Knox areas).

Martha Featherstone, Docket No. C164-591, *et al.*, order adopting Examiner's decision issued March 26, 1965, *appeal pending sub nom. Atlantic Ref. Co. v. FPC*, CA 3 No. 15463 (Wyoming).

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Turnbull & Zoch Drilling Company (Operator), Docket No. G-17960, *et al.*, pending before Commission on exceptions to examiner's decision (Texas R. R. Dist. No. 4).

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No. 22

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, *Petitioner,*

v.

CALLERY PROPERTIES, INC.; THE SUPERIOR OIL COMPANY; CAROLINE HUNT SANDS and LOYD B. SANDS; PLACID OIL COMPANY; MARGARET HUNT HILL, Trustee for Hassie Hunt Trust; J. RAY MCDERMOTT & CO., INC.; OCEAN DRILLING & EXPLORATION COMPANY; J. R. FRANKEL, ET AL.

On Petition For a Writ of Certiorari to the United States Court of Appeals For the Fifth Circuit

BRIEF FOR PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK

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BRIEF FOR PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK

OPINIONS BELOW

The opinion of the court of appeals (R. 619-42) is reported at 335 F.2d 1004. The opinion and order of the Federal Power Commission (R. 549-93) is reported at 30 FPC 283.

JURISDICTION

The judgment of the court of appeals setting aside the Commission's order was entered on August 14, 1964 (R. 643). The petition for a writ of certiorari was filed on November 12, 1964, and was granted on March 8, 1965 (R. 646), 380 U.S. 931. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. § 717r(b).

QUESTIONS PRESENTED

1. In passing upon producer certificate applications under Section 7 of the Natural Gas Act, is the Federal Power Commission required, prior to the imposition of a price-reducing condition, to receive and evaluate cost and other evidence of the type normally considered in a rate hearing under Sections 4 and 5 of the Act where (a) receipt of such evidence would, by converting the certificate hearing into a rate hearing, make it impossible to process certificate applications, (b) the evidence thus received would be duplicative of evidence being received in the rate proceedings currently pending before the Commission, and (c) Commission imposition of a price-reducing condition in the certificate in no way bars the producer from subsequently filing for and collecting his initial contract price pending the outcome of the rate proceeding?

2. Where, following judicial reversal of its earlier unconditional certifications of high-priced producer sales, the Federal Power Commission on remand determines that the initial price should have been conditioned to a lower, "in-line" level, does the Commission have power to require the producers to refund

amounts in excess of the "in-line" level previously collected under the judicially invalidated certificates?

3. In issuing certificates of public convenience and necessity under Section 7 of the Natural Gas Act, does the Federal Power Commission have power to impose a condition barring for a limited period of time (during which it is anticipated that the just and reasonable area rate will be determined) future rate increase filings to levels which, because of their price-triggering effect on other contracts, will have a disruptive influence on gas costs and an adverse effect on the ultimate consumer?

STATUTE INVOLVED

The pertinent provisions of the Natural Gas Act, 52 Stat. 821, as amended, 15 U.S.C. §§ 717-717w, are set out in the appendix, *infra,* pp. 1a-5a.

STATEMENT OF THE CASE

Background—In June 1957—two months before the first of the contracts involved in the present appeal was executed—the Federal Power Commission issued unconditioned certificates authorizing the Cities producers to undertake a major new sale of gas for resale in interstate commerce from fields offshore Southern Louisiana at an initial price of 21.4¢ per Mcf plus tax reimbursement. *Continental Oil Co.,* 17 FPC 880. Two years later, this Court unanimously reversed the Commission's action, setting aside the unconditional certification on the ground that the 21.4¢ price was out of line and remanding with directions to the FPC to hold the line on initial prices. *Atlantic Refining Co.* v. *Public Service Commission of New York,* 360

U.S. 378 (1959). On remand, further hearings were held, and in January 1962 the Commission ruled that the appropriate line in Southern Louisiana was not the 21.4¢ per Mcf sought by Catco but rather 18.5¢ per Mcf (plus 1.5¢ tax reimbursement where applicable). Accordingly, the Commission issued new certificates limiting the initial price to 18.5¢ per Mcf and requiring full refunds of all excess amounts previously collected under the invalid certificates. *Continental Oil Co.*, Op. 351, 27 FPC 96.[1]

In the brief period (September 1958-August 1959) between the Commission's original unconditional certification of Catco and this Court's reversal and remand, the Commission, in six separate formal hearings involving a total of 69 producer applications, followed its original erroneous Catco standard and issued unconditioned certificates for Southern Louisiana sales at initial prices ranging from 21.4¢ per Mcf where no tax reimbursement was due to 23.8¢ including tax reimbursement. On appeals taken by petitioner and others, the Commission's repetitions of its Catco error were remanded by this Court and by the

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[1] Appeals from Opinion 351 were taken both by the Catco producers, 9th Cir. No. 17909 *et al.*, and by the Public Service Commission of New York, 9th Cir. No. 17999; the former contended the price line was too low and challenged the refunds, while the latter contended the price line was too high. Prior to briefing of the appeal, however, a settlement was reached (later approved by the Commission, 28 FPC 1090), and the appeals were withdrawn. Under the terms of the settlement, (1) the 18.5¢ price was confirmed, (2) refunds were reduced to two-thirds, (3) the Catco producers waived their right to file for future increases pending the outcome of the area rate proceeding, and (4) provision was made for settlement, on similar terms, of three other substantial sales by the Catco producers.

Courts of Appeals for the Third, Fifth, Ninth, Tenth, and D.C. Circuits.[2]

Subsequently, by order issued March 7, 1962, the Federal Power Commission consolidated all 69 of the remanded producer dockets, together with five related dockets, for further proceedings, 27 FPC 482 (R. 409); see also 27 FPC 15 (R. 395). In its order, the Commission noted (1) that six weeks earlier, in the remanded Catco dockets, it had found the in-line level in Southern Louisiana to be 18.5¢ per Mcf, plus 1.5¢ tax reimbursement where applicable, and (2) that the consumer interests, who had been successful in the earlier appeals, were urging that the remanded proceedings be disposed of, without further delay, on the basis of the revised Catco determination. Though

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[2] The original Commission opinions, and the court reversals, are as follows:

(1) *Transcontinental Gas Pipe Line Co.*, Op. 315, 20 FPC 264 (1958); *aff'd sub nom. United Gas Improvement Co.* v. *F.P.C.*, 269 F. 2d 865 (3rd Cir. 1959), *summarily rev'd sub nom. Public Service Commission of New York* v. *F.P.C.*, 361 U.S. 195 (1959).

(2) *Texas Gas Transmission Corp.*, Op. 327, 22 FPC 378 (1959), *rev'd Public Service Commission of New York* v. *F.P.C.*, 287 F. 2d 146 (D.C. Cir. 1960), *cert. denied*, 365 U.S. 880, 882 (1961).

(3) *California Co.*, 22 FPC 252 (1959), *rev'd United Gas Improvement Co.* v. *F.P.C.*, 283 F. 2d 817 (9th Cir. 1960), *cert. denied*, 365 U.S. 879, 881 (1961).

(4) *Sun Oil Co.*, 22 FPC 351 (1959), *rev'd United Gas Improvement Co.* v. *F.P.C.*, 290 F. 2d 133 (5th Cir. 1961), *cert. denied*, 368 U.S. 823 (1961).

(5) *Sunray Mid-Continent Oil Co.*, 22 FPC 361 (1959), *rev'd United Gas Improvement Co.* v. *F.P.C.*, 287 F. 2d 159 (10th Cir. 1961).

(6) *Superior Oil Co.*, 22 FPC 369 (1959), *rev'd United Gas Improvement Co.* v. *F.P.C.*, 290 F. 2d 147 (5th Cir. 1961), *cert. denied*, 366 U.S. 965 (1961).

conceding that there was merit to the consumer position, the Commission nonetheless concluded that it "should afford the producers further opportunity to be heard" (R. 415), and accordingly set the consolidated proceeding for hearing.

Prior to the commencement of the remanded hearings, however, conferences were held between a number of the producer applicants and the intervenors, and proposed settlements were entered into and submitted to the Commission for its approval; approval was forthcoming on July 30, 1962, 28 FPC 247. Although these settlements covered the bulk of the remanded applications, some producers—including respondents here—were unwilling to accept the settlement terms, and hearing on their remanded applications was held before an FPC examiner on June 18-21, 1962.

At the outset of that hearing, the producers sought to introduce what the examiner described as "a tremendous mass of cost-type, economic and financial evidence" (R. 495). On motion of certain of the intervenors, supported by the Commission staff, the examiner ruled that such evidence was inadmissible. Evidence on the level of prices in Southern Louisiana during the period 1954-1962 was admitted, however, and was cross-examined.

The Commission's Determination—On December 7, 1962 the examiner issued his decision (R. 490-540), in which he concluded that the in-line price for the contracts here involved was 18.5¢ per Mcf plus 1.5¢ tax reimbursement where applicable, and he directed that the producers refund with interest all amounts previously collected in excess of the in-line levels of 18.5¢ and 20¢. Accepting, in the main, all of the examiner's

findings and conclusions, the FPC, by decision issued July 9, 1963, (1) unanimously sustained the examiner's exclusion of cost data, (2) unanimously sustained the examiner's finding that the in-line level for the contracts here involved was the 18.5¢-plus-tax figure previously determined to be appropriate in the remanded *Catco* proceeding, 27 FPC 96 (1962), and (3) with one Commissioner dissenting, ordered the producers to refund amounts in excess of 18.5¢-plus-tax previously collected under the judicially invalidated certificates. In addition, on the basis of its finding that rate filings to levels in excess of 23.55¢ per Mcf would cause widespread price triggering throughout Southern Louisiana, the Commission imposed a moratorium on filings in excess of 23.55¢ until July 1, 1967 or until the conclusion of the pending Southern Louisiana area rate proceeding, AR61-2, whichever is earlier.

Decision of the Court Below—On August 14, 1964, the Court of Appeals for the Fifth Circuit reversed the Commission on each of the principal issues in the case. Although stating that this Court's *Catco* decision, *Atlantic Refining Co.* v. *Public Service Commission of New York*, 360 U.S. 378 (1959), was "no doubt . . . significant and binding, and we accept it without any effort to whittle it down," the court below sharply criticized the Commission's application of the "in-line" concept articulated in *Catco*, concluding that the Commission "has no power to deny the [certificate] application solely on the ground that the price is not 'in-line.'" Before the Commission may deny or condition a certificate application based on an out-of-line price, the court held, it must consider all factors bearing upon public convenience and necessity. One of the

most critical factors, according to the court, is the nature of the demand for natural gas—"the insatiable energy requirements" resulting from the fact that "population is increasing at explosive rates"—and "the decisive question then becomes what price will it take to get the needed gas?" Accordingly, concluded the court, the Commission committed reversible error in refusing to receive evidence of supply and demand.

Similarly, the court held that the cost-of-service data (of a type that would be relevant in a rate proceeding under Section 4 or 5 of the Act) proffered by the applicants on remand was relevant *as a matter of law* in determining public convenience and necessity. While twice conceding that the Commission is not required under Section 7 to enter into a "full dress § 4 or § 5 rate hearing," the court suggested that, through "resourceful ingenuity," the Commission could in a Section 7 proceeding conduct, in effect, an investigation into the just and reasonable rate without actually holding a rate hearing.

With respect to the Commission's imposition of a partial moratorium on rate increase filings, the court held, as it had in reversing a Commission-imposed moratorium in a temporary certificate in *Hunt* v. *F.P.C.*, 306 F.2d 334 (1962), that, however desirable the goal, imposition of a moratorium constituted an improper attempt by the Commission to supersede Section 4. The court below distinguished the subsequent reversal of its *Hunt* opinion by this Court, *F.P.C.* v. *Hunt*, 376 U.S. 515 (1964), on the ground that the later opinion makes a critical distinction between temporary and permanent certificates; the court below concluded, in fact, that *Hunt* now requires that "the more sweeping statements made in Catco where

reference was made to conditional certificates without indication as to permanent or temporary must now be read as conditional *temporary* certificates" (emphasis in original).[3]

Turning to the refund issue, the court below agreed that the producers were not entitled "to retain . . . what was obtained under invalid orders." In the court's view, however, this provided "no reason why the producers should be required . . . to refund the difference between the amount collected and the conditioned price as soon as it is determined"; rather it would permit the producers to retain the excess revenues pending determination of the just and reasonable rate. The court found this procedure necessary in order to prevent the consumer from obtaining "an undeserved windfall," which, according to the court, would occur should it ultimately be determined that during the period that the excess rates were collected the just and reasonable rate was higher than the in-line price. "Nothing in the law," says the court below, "should encourage that result or its possibility."

SUMMARY OF ARGUMENT

In its landmark *Catco* decision, this Court held that the consumer-protective purpose of the Natural Gas Act required the Federal Power Commission to give "a most careful scrutiny and responsible reaction to initial price proposals of producers under § 7" of the Act, 360 U.S. at 391, in order to assure that rates for new interstate sales would be consistent with the public interest. Though accepting the Commission's

[3] The conclusion of the court below is remarkable in that the *Catco* case involved only permanent certificates, not temporary certificates. See note 18, *infra*, p. 35.

argument that a "just and reasonable" rate hearing was neither legally required nor administratively feasible as a prerequisite to Section 7 certification, the Court suggested that the Commission could and should discharge its statutory responsibility in this area through the exercise of its power to attach conditions to the certificates it issues. Specifically, the Court stated:

> "Where the proposed price is not in keeping with the public interest because it is out of line or because its approval might result in a triggering of general price rises or an increase in the applicant's existing rates by reason of 'favored nation' clauses or otherwise, the Commission in the exercise of its discretion might attach such conditions as it believes necessary." 360 U.S. at 391.

Responsive both to the general tenor and the specific suggestion of *Catco,* the Commission evolved a new policy for handling producer certificate applications, and, with one exception (the refunds arising out of the earlier remands), the present case is a typical example of that policy. In scrutinizing initial price proposals, the Commission treats two issues as crucial: (1) Is the price out of line with the pattern of initial prices set by previously certificated sales? and (2) Will certification of the proposed sale result in a triggering of general price rises either immediately upon certification or within a few years thereafter? If both of these questions can be answered negatively, and assuming the other, non-price elements of public convenience and necessity have been met, the application is granted and an unconditioned permanent certificate is issued. But where either or both of these price questions are answered affirmatively, appropriate conditions, designed to correct the proposal so that it

will conform to the public interest, are imposed. Thus, where, as here, the proposed price is out of line, the certificate is conditioned upon a reduction to the in-line level. And where, as here, the contract schedule of future price increases would, if filed, trigger a general price rise under existing contracts, a rate-filing moratorium is imposed, to remain in effect pending the conclusion of the area rate proceeding for the particular producing area.

I

The Commission acted well within the scope of its discretion in choosing, as its initial-price-conditioning level, the pattern set in contracts which had previously been permanently certificated (excluding from the reference group, of course, any certifications made under the erroneous pre-*Catco* standards). Since the in-line level was in no way dependent upon a "just and reasonable" rate finding of the type required in a rate proceeding under Sections 4 and 5, evidence proffered by the applicants bearing on the "just and reasonable" rate was not relevant and, in view of the delay and complication which admission of such evidence would entail, was properly excluded. Moreover, the exclusion of such data from the certificate case, while permitting reasonably prompt disposition of the certificate application, works no hardship on the producer, who, upon acceptance of a certificate conditioned as to initial price, remains free to file under Section 4 for an increase to his original out-of-line contract price, and to collect that price, subject to refund, pending the outcome of the concurrent area rate proceeding, in which all evidence relevant to a determination of "just and reasonable" rates is, of course, admissible.

In holding that the in-line level was *not* a proper initial-price-conditioning standard under *Catco,* the court below not only misread this Court's decision, but did so in a way which totally frustrates the purpose of the Act to provide consumers with a complete, permanent and *effective* bond of protection against excessive rates and charges. The conditioning standard required by the court below—"just and reasonable" rate in light of supply-demand factors—would convert every contested certificate case into an area rate proceeding, and would make the certificate cases as nigh interminable as the rate cases have proven to be.

II

The court below agreed that in the circumstances of this case—where the producer applicants had commenced selling their gas pending appeal of the original unconditioned certificates—the Commission had power to order refunds of amounts collected in excess of the proper price-conditioned level. However, in view of its holding that the proper conditioning level was the "just and reasonable" level and not the in-line level, the court held that refunds should be required only to the extent that the amounts previously collected exceeded the "just and reasonable" rate.

It is obvious that the court of appeals' holding on refunds is merely an application of its erroneous holding on the proper conditioning standard, discussed above. Since the in-line level chosen by the Commission for conditioning was a proper standard, it follows that the measure of refunds ordered by the Commission—the excess above the in-line level—was also proper. The Commission's result is wholly appropriate and indeed was required by the nature of the

earlier judicial reversals of unconditional certification, for it places all parties in the same position they would have been in had the Commission in the first instance issued valid certificates, i.e., certificates appropriately conditioned as to price.

III

On finding that the filing of rates in excess of 23.55¢ per Mcf would trigger a general price rise in the Southern Louisiana producing area, the Commission reacted responsibly by conditioning the certificates to prohibit the filing of increases above this triggering level pending the outcome of the Southern Louisiana area rate proceeding. The Commission's power to bar, at the very outset, escalator clauses which would permit manipulation of prices upward in a way that would defeat effective regulation was suggested by this Court at least as early as *Catco,* and was specifically confirmed in two very recent decisions—*F.P.C.* v. *Hunt,* 376 U.S. 515 (1964), and *F.P.C.* v. *Texaco Inc.,* 377 U.S. 33 (1964).

ARGUMENT

Introduction—During the past decade no problem under the Natural Gas Act has been more hotly litigated—and certainly none has received more judicial attention—than the standards and procedures which should govern the Federal Power Commission's grant of certificate authority to a natural gas producer to undertake a new sale in interstate commerce.

The statutory language is simple enough. Section 7(c) of the Act provides that before a sale of natural gas in interstate commerce for resale may be made, the seller must obtain "a certificate of public con-

venience and necessity issued by the [Federal Power] Commission authorizing such act"; such certificate may be issued only after notice and hearing.[4] Section 7(e) provides that a certificate shall be issued to qualified applicants if it is found (1) that the applicant is able and willing to render the proposed service and to conform to the provisions of the Act and (2) that the proposed sale, "to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity." Section 7(e) also authorizes the Commission to attach to any certificate "such reasonable terms and conditions as the public convenience and necessity may require."

The explicit statutory standard, then, for determining whether a given new sale should be authorized is whether that sale is required by the public convenience and necessity. This is obviously a broad standard, whose specific interpretation and application must depend on the nature of the problem. It is to that problem that we now turn.

Following this Court's 1954 ruling in *Phillips Petroleum Co.* v. *Wisconsin,* 347 U.S. 672, that the FPC had the statutory responsibility for regulating interstate sales by natural gas producers, the Commission was faced with two major problems—first, to determine the just and reasonable rates, under Sections 4 and 5 of the Natural Gas Act, for producer sales in interstate commerce; and, second, to develop a standard which would permit new sales to be made under pricing arrangements that would protect all interests pending

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[4] An exception to the notice and hearing requirement is made for temporary certificates, which Section 7(c) authorizes the Commission to issue "in cases of emergency, to assure maintenance of adequate service or to serve particular customers."

determination of the just and reasonable rates. Inasmuch as the determination of just and reasonable rates has proven to be "nigh interminable"[5]—it was not until August 5, 1965, eleven years after *Phillips*, that the Commission arrived at its first and to date only such determination[6]—the Commission quite early ruled that it was not administratively feasible to determine the just and reasonable rate in a certificate case. From this, it concluded that it should grant unconditional certification, even where the proposed new rate exceeded the prior "going rate" in the area, and it sought to justify its action by reasoning that the higher price thus certificated could be tested in a subsequent rate investigation, instituted under Section 5 of the Act, and could be reduced (albeit prospectively only) if found excessive. In the landmark *Catco* case, *Atlantic Refining Co.* v. *Public Service Commission of New York*, 360 U.S. 378 (1959), this Court found the Commission's reasoning unconvincing, since unconditional certification of an out-of-line price would permit the applicant to collect and retain that price, without any possibility of refund should the price prove to be excessive, during the long period between certification and the ultimate conclusion of the Section 5 investigation. Accordingly, the Court directed that "where the proposed price is not in keeping with the public interest because it is *out of line*," the Commission should impose a rate condition in order that

> "the consuming public may be protected while the justness and reasonableness of the price fixed

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[5] *Atlantic Refining Co.* v. *Public Service Commission of New York*, 360 U.S. 378 at 389 (1959).

[6] *Permian Basin Area Rate Proceeding*, Op. 468 (August 5, 1965).

by the parties is being determined under other sections of the Act. Section 7 procedures in such situations thus act to *hold the line* awaiting adjudication of a just and reasonable rate." 360 U.S. at 391-92. (Emphasis added.)

What is significant for present purposes is that this Court's *Catco* decision did *not* condemn or impugn in any way the FPC's administrative determination that it was not possible at the time of initial certification to conduct an investigation as to the just and reasonable rate for the proposed new sale; rather the Court held that, assuming such a determination is not possible, the Commission must use its conditioning power to protect the consuming public pending the outcome of the subsequent rate investigation.

Moreover, as Judge J. Skelly Wright aptly noted in discussing the *Catco* decision, the Commission's use of price-limiting conditions in certificating new sales "does not foreclose a company from obtaining an increase under Section 4" and from collecting the increased rate, subject to refund, pending the outcome of a determination, in a Section 4 proceeding, of the proper rate for the sale, *Atlantic Refining Company* v. *F.P.C.*, 316 F.2d 677 at 679 (D.C. Cir. 1963). Thus, even though a price condition is imposed in the certificate, the producer nevertheless remains free to charge and collect the initial price set forth in his contract. The practical consequences of an initial price condition become evident at the end of the subsequent rate determination: without such a condition, no refunds would be possible even though it should be demonstrated that the contract price had been excessive, whereas with a condition, refunds, at least down to the conditioning level, would be required of such

excess amounts. It was these considerations which led Judge Wright to conclude: "if the Commission is to err in setting an initial rate, it should err on the low side because the company, under Section 4, can immediately increase the rate, subject to disallowance by the Commission after a full rate proceeding, the public being protected with reference to refunds in the interim." *Atlantic Refining Co.* v. *F.P.C., supra,* 316 F.2d at 679.

It is true, of course, that as a legal proposition the Commission could, consistent with *Catco,* elect to make a determination of the just and reasonable rate at the time of certification and could certificate at that level even though the rate might be out of line with earlier prices. Thus, in an opinion written a year before this Court's *Catco* decision,[7] Judge Bazelon observed that where a proposed initial price was out of line, the Commission had two alternatives—it could either determine the just and reasonable rate and issue a certificate at that level, or it could impose a rate condition in order to hold the line and protect the public during the period in which the propriety of the rate was being tested. The choice between the two alternatives was for the Commission, Judge Bazelon noted; what the Commission could *not* do was to

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[7] *Oklahoma Natural Gas Co.* v. *F.P.C.,* 257 F.2d 634 at 652-53 (dissenting opinion), *cert. granted,* 358 U.S. 877, *cert. dismissed on petitioner's allegation of mootness,* 358 U.S. 948. A careful reading of Judge Bazelon's opinion in *Oklahoma Natural* and Mr. Justice Clark's opinion in *Catco* reveals a striking similarity in analysis and approach; and there is no question that Judge Bazelon's view has been adopted by the D.C. Circuit, see *Public Service Commission of New York* v. *F.P.C.,* 287 F.2d 146 at 149 (D.C. Cir. 1960), and *Atlantic Refining Co.* v. *F.P.C.,* 316 F.2d 677 at 679 (D.C. Cir. 1963).

grant unconditional certification of an out-of-line price without a finding that the price was just and reasonable. Accordingly, where the Commission has certificated an out-of-line price, its action can be sustained only if it has made the requisite findings of justness and reasonableness; and it was for this reason that in *Catco* this Court searched the record for supporting cost data, 360 U.S. at 392-93. But Mr. Justice Clark very specifically held that the Commission was *not* required to determine justness and reasonableness in the certificate proceeding and that the Commission's certificate responsibilities could be adequately discharged through the use of conditions designed to hold the line, 360 U.S. at 390-92.

In the immediate post-*Catco* era, the Commission initially expressed uncertainty as to the role which rate-case type evidence—i.e. individual-company or industry-wide cost and financial data, trends in supply and demand and their impact on the need for "incentive" price allowances, etc.—should play in a certificate proceeding. Although it had been established that consumer representatives could not require the producer applicants to present evidence of their costs as a prerequisite to certification, *El Paso Natural Gas Co.*, Op. 335, 23 FPC 369 and 23 FPC 610 at 613 (1960), aff'd *Texaco, Inc.* v. *F.P.C.*, 290 F.2d 149 at 157 (5th Cir. 1961), the Commission in a number of early post-*Catco* cases permitted the applicants to present cost data if they desired. However, the Commission soon discovered that rate-case type evidence was not helpful in determining whether a certificate should issue, see, e.g., *Continental Oil Co.* (*Catco*-on-remand), Op. 351, 27 FPC 96 (1962); *El Paso Natural Gas Co.*, Op. 358, 27 FPC 1134 at 1137-38 (1962). Moreover,

since (1) admission of the rate-case data—together with the related cross-examination and rebuttal evidence—would make each certificate proceeding as "nigh interminable" as the rate proceedings were proving to be, and (2) admission of the rate-case data in the certificate proceedings would make the certificate proceedings duplicative of the area rate proceedings, instituted for each major producing area, the Commission ultimately held, in *Skelly Oil Co.*, Op. 362, 28 FPC 401 (1962),[8] that cost-of-service and financial-requirements evidence is not relevant in producer certificate cases.[9] As the Commission subsequently advised Congress, "This precedent-setting opinion has served to simplify independent producer initial service cases and has enabled the Commission to try these applications expeditiously." *Forty-Third Annual Report of the Federal Power Commission*, 1963, p. 13.

Following issuance of the *Skelly* opinion, the Commission and its examiners consistently excluded cost data from producer certificate cases, and the promise of expeditious treatment held out by *Skelly* was realized: the backlog of producer certificate applications was sharply whittled down through a series of consolidated proceedings, in which the hearings concluded

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[8] Affirmed on this point, *Public Service Commission of New York* v. *F.P.C.*, 329 F.2d 242 (D.C. Cir. 1964), cert. denied sub nom. *Prado Oil & Gas Co.* v. *F.P.C.*, 377 U.S. 963.

[9] These conclusions were not reached in a vacuum, but were the fruit of bitter experience; thus the Commission noted, 28 FPC at 411, that where—as in the remanded *Catco* hearings—cost and financial data had been presented, rebutted, and cross-examined, and detailed findings made, the proceedings had been "complicated [and] long-drawn-out" and the results were "of limited utility."

in a week or two, with the hearing transcript seldom running more than 1500 pages.[10]

Although one would assume that producer applicants would be pleased with an expeditious procedure that would permit them to move their gas into the interstate market promptly and, though deferring a detailed rate investigation to a subsequent proceeding, would permit them to collect their contract prices subject to refund of amounts later found excessive, the fact is that, as here, the producers have opposed the new procedures. The reason is not hard to find. Although no producer may commence a sale until he receives Section 7(c) certificate authority—which requires a hearing in which affected consumer interests may participate—the Commission has, since about the time of this Court's *Catco* decision, followed a practice of routinely issuing *ex parte* "temporary certificates" within a few weeks after the producer application has been filed and long before it is noticed for hearing. These "temporary certificates"—which the Act authorizes only "in cases of emergency, to assure maintenance of adequate service or to serve particular customers"—are frequently issued at out-of-line prices and in many instances contain no provision for refund. Thus, by the time a public hearing is held, the producer is already selling his gas under the temporary certificate, and is receiving a price which is higher than he is likely to receive upon permanent certification; he is obviously in no hurry to have the hearing conclude, and if a side excursion into the just and reasonable level might serve to delay the certifi-

[10] This contrasts with producer rate cases, where the hearings last from one to three years or even longer, and the hearing transcript frequently runs upward of 25,000 pages.

cate hearing for two or three years, so much the better. Moreover, the Commission has held that where it has issued a temporary certificate at an out-of-line price and has failed to include an express refund condition, it will not order refunds at the time it grants permanent certification at the lower in-line level, *Skelly Oil Co.*, Op. 362, 28 FPC 401 (1962). Although this holding has been judicially reversed, *Public Service Commission of New York* v. *F.P.C.*, 329 F.2d 242 at 248-50 (D.C. Cir. 1964), cert. denied sub nom. *Prado Oil & Gas Co.* v. *F.P.C.*, 377 U.S. 963, the Commission has failed to take action in the remanded *Skelly* case or in any similar case and to date has declined to order refunds of excess amounts collected under an out-of-line but non-conditioned temporary certificate.[11]

In the present case, of course, no temporary certificates are involved, but the situation—and the interest in delay—is much the same. Here the producers have, for some five or six years, been selling their gas, and are selling it today, at the original 23¢ prices certificated by the FPC in 1958-59 and set aside by the courts in 1959-61.

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[11] Although the Commission's issuance of "emergency" certificates as a matter of routine would seem to be a clear contradiction in terms, the Court of Appeals for the D.C. Circuit has sustained the FPC's actions apparently on the theory that the Commission's power to adopt rules and regulations (under Section 16 of the Natural Gas Act) constitutes a separate source of substantive power. *Public Service Commission of New York* v. *F.P.C.*, 327 F.2d 893 (D.C. Cir. 1964); but see *Algonquin Gas Transmission Co.* v. *F.P.C.*, 201 F.2d 334 (1st Cir. 1953) for a more traditional view.

I. THE COMMISSION ACTED PROPERLY IN CONDITIONING ITS ISSUANCE OF CERTIFICATES OF PUBLIC CONVENIENCE AND NECESSITY UPON THE REQUIREMENT THAT THE INITIAL PRICE BE REDUCED TO THE IN-LINE LEVEL OF 20¢ PER MCF.

A. The Commission Was Not Required to Consider Cost and Economic Trend Data In Determining the Conditioning Level For Certificating the Remanded Applications.

Pursuant to the teachings of this Court's landmark *Catco* decision, as amplified by the six subsequent court of appeals decisions reversing FPC unconditional certification of out-of-line prices,[12] the Commission developed new procedures for producer certificate cases, under which applications based on contracts calling for out-of-line prices are certificated on condition that the initial price be reduced to the Commission-determined in-line level.

The in-line conditioning level is fixed by reference to the pattern of prices in the area which have previously been permanently certificated by the Commission and are not suspect or under a cloud; no consideration is given to those factors which the Commission might consider relevant in a rate proceeding—such as evidence of the cost of exploration and production, whether company-wide or industry-wide, and evidence of trends in supply and demand.

There are at least three major reasons why the Commission's rejection of such data in a certificate case is appropriate: (1) Receipt and evaluation of such data would make the certificate proceeding duplicative of the area rate proceedings presently under way for each major area; in the area proceedings, the whole

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[12] The six reversals, set forth *supra* p. 5, are, of course, the very decisions which led to the remanded proceedings under review here.

purpose is to determine the just and reasonable rate, and any evidence directed to that end is, of course, admissible. (2) Since the producer is free, unless he has otherwise disabled himself, to reject the conditioned certificate, and since he is also free, unless barred by a moratorium clause of a type not present here,[13] to file under Section 4 for his initial contract price, no unfairness to the producer can result from deferring the rate determination to a subsequent proceeding. (3) Where vast quantities of gas are regularly being dedicated to the interstate market at prices which are in-line, the Commission is not required to authorize the sale of higher-priced gas, even if the higher prices should be determined to return no more than a fair profit to the proposed seller.

It was for precisely these reasons that the courts of appeals, in sustaining the FPC's post-*Catco* price-conditions—imposed without reference to cost—emphasized that Section 7 and *Catco*

> "permit the Commission to fix the 'in-line' price, not on a basis of cash outlay or replacement cost, but on the basis of the price level established by comparable sales contracted for by those placing gas in the area in interstate commerce. The standards of Sections 4 and 5 are not those to be used in conditioning a certificate issued under Section 7; otherwise the purpose of *Catco* to avoid the consequences of the well nigh interminable proceedings incident to a rate case would be defeated." *Public Service Commission of New York* v. *F.P.C.*, 329 F.2d 242 at 246-47 (D.C. Cir. 1964).

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[13] The moratorium clause here does not bar filings from the in-line level of 20¢ to the initial contract price of 23.55¢, though it does bar increases in excess of 23.55¢ before July 1967.

To the same effect, see *Texaco Inc.* v. *F.P.C.*, 290 F.2d 149 at 155, 157 (5th Cir. 1961); *California Oil Co.* v. *F.P.C.*, 315 F.2d 652 at 655, 657, 659 (10th Cir. 1963); and *Atlantic Refining Co.* v. *F.P.C.*, 316 F.2d 677 at 680 (D.C. Cir. 1963).

In rejecting this line of cases and reversing the Commission's action here, the court below held that the Commission "has no power to deny the [certificate] application solely on the ground that the price is not in-line", 335 F.2d at 1012 (R. 628), and, by inference, held that the Commission had no power in the present case to issue a certificate on condition that the initial price be reduced to the in-line level. Rather, in the court's view, the Commission was required, as a matter of law, to consider "the extent and nature of supply and demand," 335 F.2d at 1013 (R. 629), and evidence of price trends and of exploration and production costs, 335 F.2d at 1014 (R. 631-32), in order that the Commission might weigh all of these factors in determining whether the requested certificates should be denied, granted outright, or granted subject to conditions.

It is clear that the reasoning of the court below must be rejected.

1. While proceeding from the correct premise that there are a number of elements comprising "public convenience and necessity," the decision assumes that an applicant's failure to meet one of the most important elements—price—may be excused if he more than meets certain other standards. This is patently incorrect. In the first place, the applicant is obligated to satisfy *all* of the requirements, especially price, and his failure to do so would justify denial of the certificate. In the second place, the Commission's condition-

ing power, by permitting the Commission to single out specific defects for correction, avoids confronting the Commission with an all-or-nothing choice, and eliminates the need for "balancing". Finally, the thesis is especially inappropriate here. The court below would presumably permit a higher-than-in-line price if the demand were demonstrated to be very great. But it is precisely when the demand is great that FPC protection against excessive prices is most important.

2. Assuming that supply and demand could affect the matter of public convenience and necessity, it is unrealistic to assume, as did the court below, that the proffered evidence was of a type likely to be meaningful and that without such evidence the Commission would be unaware of the general supply-demand picture. The Commission's day-to-day operations necessarily keep it highly informed, in a most realistic way, of both the need for gas by the various pipelines and of the producers' willingness to sell their gas at the in-line levels. Certainly the Commission's experience, both before issuance of the decision here under review and since, demonstrates that there are vast quantities of gas available at the in-line level in Southern Louisiana—indeed more gas than the pipelines are able to cope with. Within six months of the Commission's decision here, the Commission certificated the two largest sales ever to come before it. Both were from Southern Louisiana fields, and both were based, in essence, on the in-line levels found by the Commission in the present case, *Columbia Gulf Transmission Co.*, 30 FPC 1297 (1963) (sale of 6.1 trillion cubic feet of South Louisiana gas by Humble Oil & Refining Company); *Texas Eastern Transmission Corp.*, 30 FPC 1559 (1963) (sale of 4.4 trillion cubic feet of South Louisiana gas by Gulf Oil Corporation).

3. The standard set up by the decision below, while perhaps conforming to a prevalent view that in administrative hearings all proffered evidence should be admitted "for what it is worth", constitutes a nightmare at both the trial and initial decisional levels. At the trial level, the certificate hearing would necessarily become a complete repeat of the area rate proceeding, notwithstanding the unamplified suggestion of the court below that receipt of cost evidence need not lead to a "full dress § 4 or § 5 rate hearing." 335 F.2d 1014-15 (R. 632). If the producer may present evidence of the type relevant in an area-rate proceeding and if the Commission must consider such evidence, then surely the FPC staff and consumer intervenors will be obliged to cross-examine and rebut the applicant's testimony, and the result will be indistinguishable from a rate hearing. Further, while the decision below would require the Commission to consider supply and demand and cost along with in-line price data, it provides no rational scheme by which the three elements may be blended into a meaningful Commission decision. Suppose a proposed price is out of line by 5¢ per Mcf, that it will not return an unreasonable profit to the particular producer applicant (who is a high-cost producer), and that, as is usually the case, the evidence on supply and demand is conflicting: What price should the Commission find required by public convenience and necessity? Or again, assume the industry-wide cost of exploring for and producing new supplies of gas is 3¢ *lower* than the in-line level, and that current supply exceeds current demand; What finding should the Commission make with respect to price? It is all very well to suggest various factors that might be considered, but unless the precise way in which those factors are to be used

is spelled out, see, e.g. *Lynchburg Gas Co.* v. *F.P.C.*, 336 F.2d 942 (D.C. Cir. 1964), the suggestion either calls for a meaningless inquiry, on the one hand, or is an invitation to uncontrollable administrative fiat, on the other.

4. Assuming that a producer applicant under Section 7 has a right, at some point, to have his rate proposal tested by the rate standards of the Act, and assuming further that such standards encompass supply and demand, cost, and trend data, the decision below fails to make clear why the Commission is required, as a matter of law, to consider such data in the certificate hearing rather than in a concurrent or subsequent rate hearing. The administration of the Natural Gas Act is, of course, confided to the Commission, and its choice of procedures, if fair to all parties and consistent with the statutory objectives, will not normally be reversed. See, e.g., *Wisconsin* v. *F.P.C.*, 373 U.S. 294 (1963). The decision below does not suggest that the Commission's deferral of rate-case evidence to the rate case is unfair or that it represents an irrational choice of procedures.

B. The Commission's Finding That The In-Line Level Did Not Exceed 20¢ Per Mcf Is Amply Supported By Substantial Evidence of Record.

Although, in view of its disposition of the exclusion-of-evidence matter, the court below did not pass on the producer contentions that the in-line level for Southern Louisiana is higher than 20¢ per Mcf, we would strongly urge that, with the full record before it, this Court do so and reject the producer contentions on this score, so that these proceedings, pending some eight years, may finally be brought to a conclusion.

The Commission's determination that the in-line level for Southern Louisiana is 18.5¢, plus 1.5¢ tax reimbursement where applicable, is predicated principally on the Commission's finding that the in-line level for the period immediately preceding the erroneous Catco certification of June 1957 was 18.5¢ and 20.0¢. Attacking this result, petitioners below argued, as they did in the earlier appeals in which the Commission's unconditional certifications were reversed, that the line should be determined by reference to the contract prices negotiated at the Catco levels in the period following the Commission's erroneous 1957 Catco order.

Aside from the fact that the matter is *res judicata*, having been decided adversely to the producers *as to these very sales* when these cases were first before the courts four years ago, law and logic are wholly on the side of the Commission's determination. As the Fifth Circuit correctly noted in one of the earlier appeals, in 1954 pipelines were able to contract for new supplies of gas in Southern Louisiana at initial prices of 9¢ to 12¢ per Mcf, *United Gas Improvement Co.* v. *F.P.C.*, 290 F.2d 133 at 136 (5th Cir. 1961). In the fall of 1955, prices leaped from this 9-12¢ plateau to 17-18¢ as the result of the Commission's unconditional certification of new sales to Transcontinental Gas Pipe Line at 16¢ plus 1¢ tax reimbursement, *A. J. Tamborello*, 14 FPC 123, and to Tennessee Gas Transmission Company at 17¢ plus 1¢ tax reimbursement, *Alabama-Tennessee Natural Gas Co.*, 14 FPC 986 at 992-94. The final leap, to 21½¢ plus 2¢ tax reimbursement, was precipitated by the Commission's June 1957 Catco order, but the latter was tempered by this Court in

Catco and *Transco-Seaboard*[14] and by the various courts of appeals in the subsequent UGI-New York Commission cases.

Faced with the problem of determining the in-line level in the remanded Catco proceeding, the Commission might well have utilized the 1954 level of 9-12¢. Nevertheless, in that proceeding, the New York Commission and the other consumer intervenors urged no more than that the line be held to the 17-18¢ plateau reached in *Tamborello* and *Alabama-Tennessee*. Although the Commission determined the line by evaluating new contracts entered into in the two years immediately prior to the negotiation of the Catco contract,[15] it concluded from such data that the in-line base price (i.e., the price exclusive of tax reimbursement) was 18.5¢, rather than 16-17¢ as urged by the intervenors, 27 FPC 96 at 101-02, 108; and, while conceding that the in-line tax reimbursement prior to 1958 had been no more than 1¢, it nonetheless allowed 1.5¢ for this item to reflect a 1958 increase in the state tax, 27 FPC at 109; see also 27 FPC 592 at 594. Thus, the 18.5¢-20¢ level fixed in 1962 by the Commission in *Catco-on-remand* is, if anything, remarkably generous.[16]

But, problems of over-generosity aside, the evidence and arguments presented in the remanded proceedings

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[14] *Public Service Commission of New York* v. *F.P.C.*, 361 U.S. 195 (1959).

[15] In looking solely to new contracts, of course, the Commission gave no weight to the very substantial volumes of gas being sold during this period under contracts entered into earlier.

[16] Compare the admonition of Judge Wright in *Atlantic Refining Co.* v. *F.P.C.*, 316 F.2d 677 at 679 (D.C. Cir. 1963), quoted *supra* at p. 17.

here clearly demonstrated—and both the examiner (R. 506-07) and the Commission (R. 557-60) so found—that the only reason the contract prices in the post-*Catco* period were higher than prior to *Catco* was the Commission's error in unconditionally certificating the Catco sales in 1957 and that such prices, therefore, did not provide a proper basis for comparison. The Commission's finding in this regard merits repetition here (Op. 398, R. 558-59, 560):

> "In our opinion, the evidence previously presented in the course of the initial proceedings in these dockets and expanded upon in this reopened proceeding confirms the long-developing conclusion that the field price history in Southern Louisiana was decisively influenced by the *CATCO* transaction, our original decision in *CATCO*, and the widespread attention which that decision reached. Post-*CATCO* there was a new floor to prices at 21.4 cents per Mcf and pipelines either had to meet this price or go without the reserves needed for their expansion programs. * * *
>
> "* * * We agree with the finding by the examiner that the record does not show that the 1957-1958 'suspect like prices' at levels above 18.5 cents were not subject to the same infirmities which produced the *CATCO* reversal. It is our opinion, therefore, that the post-*CATCO* field price statistics relied upon by the producers to support their contract prices provide no valid basis for determination of a proper price line in the Southern Louisiana area."

II. IN ORDER TO CARRY OUT THE MANDATE OF THE SEVERAL COURTS OF APPEALS REVERSING UNCONDITIONAL CERTIFICATION, THE COMMISSION WAS REQUIRED, ON REMAND, TO CORRECT ITS EARLIER ERROR BY REQUIRING REFUNDS OF EXCESS AMOUNTS COLLECTED PURSUANT TO THE INVALID, JUDICIALLY REVERSED CERTIFICATES.

Following the Commission's original unconditional certifications in September 1958 and August 1959, timely review proceedings, challenging the initial price level, were instituted by one or more of the present petitioners. While those review proceedings were pending—indeed, in at least one instance after those review proceedings had resulted in reversal—the producers commenced their sales at the 23½¢ prices. For the most part these sales commenced during 1959, so that by the time the Commission decided the remanded proceedings, in mid-1963, the producers had been collecting their out-of-line prices for some four years. In all instances, the effect of these increased prices had been passed on by the pipeline purchasers to their customers.

Accordingly, when the Commission determined, in the order now under review, that the appropriate in-line price was 20¢ and that permanent certification should be conditioned upon the filing of an initial price of 20¢, it also concluded, as indeed it was obligated to, that its original certifications in 1958 and 1959 should have been conditioned at the in-line level of 20¢ and that the amounts which the producers had collected pursuant to the judicially reversed certificates in excess of that level should be refunded, together with appropriate interest.

In the court of appeals, the producers challenged both the Commission's power to order refunds and its right to exercise that power in the present case. Though rejecting these producer challenges, the court below,

consistent with its theory on the appropriate conditioning level, held that the proper measure of refunds was not, as the Commission had ruled, the sum collected in excess of the in-line level, but was the sum collected in excess of the just and reasonable level; thus, the payment of refunds would be deferred until after the Commission had made a determination of the just and reasonable rates for these sales.

This holding on the refund issue, we submit, is not only based on a misunderstanding of the underlying legal theory on which the refunds here involved are premised, it is also inconsistent with the decisions of other circuits and is contrary to the clear policy expressed by this Court that refunds are only partial protection at best and, to be effective, should be ordered as promptly as possible.

The legal theory on which refunds are required where deliveries have been made under high-priced, judicially invalidated certificates is, in essence, one of partial rescission and restitution. In this case, there having been no valid certificates authorizing the sales at 23½¢ per Mcf, the past transactions were contrary to law (specifically, Section 7 (c) of the Natural Gas Act); and since complete bilateral restitution—return of the full purchase price by the seller and return of the gas received by the buyer—is obviously impractical, the next best alternative is chosen: the situation is recast as though the Commission had, in the first instance, issued valid certificates, i.e., certificates limiting the initial price to 20¢. See *Hunt Oil Co.* v. *F.P.C.*, 334 F.2d 474 at 479 (5th Cir. 1964).

Even under Section 4—which specifically ties refunds of increased rates collected thereunder to the portion of the increase found "not justified"—the

courts have made it abundantly plain that, in order for the rate applicant to retain the increased rate, he must prove that the increased rate is just and reasonable *and* that he had a legal right to make the filing, see *United Gas Pipeline Co.* v. *Mobile Gas Corp.*, 350 U.S. 332 (1956). Thus, a rate applicant under Section 4 may be required to make refunds without regard to whether the increased rate is just and reasonable if there was no legal basis for the filing. *Shell Oil Co.* v. *F.P.C.*, 334 F.2d 1002 at 1010-11 (3rd Cir. 1964). *A fortiori,* where an initial rate schedule filed pursuant to a Section 7 certificate is involved, the sole question is the legality of the filing; where, as here, the filing was void *ab initio,* refunds are required.

Finally, the holding below is in sharp conflict with the policy considerations expressed by this Court in *F.P.C.* v. *Tennessee Gas Transmission Co.*, 371 U.S. 145 (1962), where, at 154-55, it was noted that, in view of the "somewhat illusory" protection which refunds afford to consumers, the Commission has the duty, "where refunds are found due, to direct their payment at the earliest possible moment consistent with due process." Accord, *Wisconsin* v. *F.P.C.*, 373 U.S. 294 at 324 n. (dissenting opinion); *F.P.C.* v. *Hunt*, 376 U.S. 515 at 524-25 (1964). In the present case, the 23½¢ prices have been collected since 1958, a period of seven years; obviously, the longer refunds are delayed, the more illusory is the protection afforded by the refund remedy.

III. THE COMMISSION PROPERLY IMPOSED A MORATORIUM ON RATE INCREASE FILINGS IN EXCESS OF 23.5c PER MCF.

In the order here under review, the Commission made two findings with respect to price levels. First, it found that the in-line level was 20¢, and it condi-

tioned the certificates to reflect this finding. Second, it found that there was a triggering level at 23.55¢, and therefore, in order to prevent extensive triggering of other contracts in the area, at least pending the outcome of the Southern Louisiana area rate proceeding, it imposed a condition prohibiting the producers from exercising any contract right to file rate increases above 23.55¢.[17] Thus, while Opinion 398 requires the producers to reduce their *initial* rate to 20¢, it permits them, upon making that rate effective, to file a rate increase under Section 4 (d) up to the contract price of 23.55¢; the moratorium feature, however, would preclude a *second* rate increase filing *above* 23.55¢ until the conclusion of the area rate proceeding, or until July 1, 1967, whichever is earlier.

The court below reversed the Commission's imposition of the moratorium on the ground that, by this device, the Commission was seeking to "supersede § 4"; the court seemed to regard Section 4 as a Congressionally intended guarantee of the producer's right to file for rate increases under any circumstances. Although the court recognized that its similar reasoning in setting aside a Commission-ordered moratorium in a *temporary* certificate, *Hunt* v. *F.P.C.*, 306 F.2d 334 (5th Cir. 1962), had in turn been reversed by this Court, *F.P.C.* v. *Hunt*, 376 U.S. 515 (1964), it interpreted this Court's *Hunt* holding, that moratoria are proper in temporary certificates, as implying that

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[17] The two different types of conditions thus imposed appear to be responsive to this Court's suggestion that certificate conditions are appropriate both to prevent out-of-line prices *and* to prevent "triggering of general price rises." *Atlantic Refining Co.* v. *Public Service Commission of New York*, 360 U.S. 378 at 391 (1959).

moratoria are improper in permanent certificates. Such an interpretation is clearly unwarranted.[18]

In the first place, in *Hunt*, this Court specifically noted that "the extent of [the Commission's broad discretionary power to condition certificates in order to hold the line in pricing] in permanent certification is not before us now." 376 U.S. at 526. More important, we believe that the rationale of the *Hunt* decision applies with equal force to sales proposed to be made under permanent certificates. For as the Court noted, "When the independent producer knocks on the door of the Commission for permission to enter his gas in interstate commerce he must submit to the requirements of Section 7," Id. at 523; and if he does not like the conditions imposed by the Commission in the certificate tendered to him, he is free to reject the certificate and to sell his gas in the intrastate market or to refuse to sell it and await a better opportunity,

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[18] The court below concluded that in *Hunt* this Court limited the application of its *Catco* decision to cases involving temporary certificates, and it pointed to what is obviously an inadvertent error in this Court's language in *Hunt* where, 376 U.S. at 523, it is stated:

> "This Court previously discussed the use of the temporary certificate procedure in *Atlantic Refining Co.* v. *Public Service Comm'n, supra.*"

Actually, there were no temporary certificates involved in the *Catco* case (a Commission proffer of a temporary certificate had been rejected by the producers, see 360 U.S. at 385), and, as the Court's discussion in *Catco* and its summary of that discussion in *Hunt* make clear, the Court was discussing *conditioned* certificates and the scope of the Commission's conditioning power. The confusion in terminology stems from the fact that both a temporary certificate and a conditioned certificate, like a rate subject to refund under Section 4, share a common characteristic—lack of finality.

Atlantic Refining Co. v. *Public Service Commission of New York*, 360 U.S. at 387.

Any lingering doubts as to whether the moratorium rule of *Hunt* would be applied to permanent certificates were dispelled by this Court's subsequent decision in *F.P.C.* v. *Texaco, Inc.*, 377 U.S. 33 (1964). That case involved a much broader power than is involved here—the Commission's right to promulgate a rule barring certain price-escalation provisions in producer sales contracts. The Court's language sustaining the Commission's power to prohibit inflationary filings by the broad brush of general rulemaking certainly justifies the Commission's power, in the closely parallel situation here presented, to accomplish similar results on an *ad hoc* basis:[19]

> "Natural gas companies that seek to enter the field with prearranged escalator clauses and the like have a built-in device for ready manipulation of rates upward. Protection of the consumer interests against that device may be best achieved if it is given at the very threshold of the enterprise. At least the Commission may so conclude; and the legislative history makes clear that its authority reaches that far." 377 U.S. at 42-43.

CONCLUSION

After years of failing to exercise its regulatory powers under Section 7, the Federal Power Commission, at the prodding of consumer interests and in response to the guidance furnished by this Court's *Catco* decision, has finally evolved a reasonably fair and workable program for the issuance of producer certificates

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[19] In *Texaco*, as here, the evil to be avoided was the "vast proliferation of hearings" that would result if the Commission's remedial action were invalidated, 377 U.S. at 44.

—a program which, at long last, promises the consumer the "complete, permanent and effective bond of protection" [20] intended by Congress. That program would be wholly nullified by the decision below.

Petitioner respectfully requests that this Court vacate the judgment of the court of appeals and remand this case to the court below with directions to affirm the decision of the Federal Power Commission.

Respectfully submitted,

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August 25, 1965

[20] *Atlantic Refining Co.* v. *Public Service Commission of New York*, 360 U.S. 378 (1959).

APPENDIX

Natural Gas Act

Section 4. (a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

* * * * * * * * * *

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, State commission, or gas distributing company or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company

affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company, making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible. [52 Stat. 822 (1938); 76 Stat. 72 (1962) 15 U. S. C. § 717c]

SECTION 5. (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing

company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however,* That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural-gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural-gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates. [52 Stat. 823 (1938); 15 U.S.C. §717d(a)]

SECTION 7. (c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however,* That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on the effective date of this amendatory Act, over the route or routes or within the area for which application is made and has so operated since that

time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceeding, if application for such certificate is made to the Commission within ninety days after the effective date of this amendatory Act. Pending the determination of any such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest. [52 Stat. 825 (1938), as amended, 56 Stat. 83 (1942); 15 U. S. C. § 717f(c)]

* * * * * * * * * *

(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized

by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require. [56 Stat. 84 (1942); 15 U. S. C. § 717f(e)]

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JOHN F. DAVIS, CLER

No. 26

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

OCEAN DRILLING & EXPLORATION COMPANY,
Petitioner,

v.

FEDERAL POWER COMMISSION,
PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
THE UNITED GAS IMPROVEMENT COMPANY,
THE LONG ISLAND LIGHTING COMPANY,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONER'S BRIEF

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No. 26

In The

Supreme Court of the United States

October Term, 1965

Ocean Drilling & Exploration Company,
Petitioner,

v.

Federal Power Commission,
Public Service Commission of The State of New York,
The United Gas Improvement Company,
The Long Island Lighting Company,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONER'S BRIEF

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit (R. 619-42) is reported at 335 F. 2d 1004. The opinions and orders of the Federal Power Commission (R. 549-93, 606-17) are reported at 30 FPC 283 and 682.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on August 14, 1964 (R. 643-44). By order dated November 6, 1964, Mr. Justice Black extended the time for filing a petition for writ of certiorari to Novem-

ber 23, 1964 (R. 644). The petition was filed on that date, and certiorari was granted on March 8, 1965 (R. 646). Jurisdiction of this court is invoked under 28 U.S.C. § 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTION PRESENTED

Whether the Federal Power Commission has authority under section 7(e) of the Natural Gas Act to require producers to refund amounts previously collected pursuant to unconditional permanent certificates?

STATUTES INVOLVED

The Natural Gas Act, 52 Stat. 821, as amended, 15 U.S.C. 717a - 717w, and particularly § 7(e) and § 19(c) of that Act.

> § 7(e). Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.
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> • • • •

§ 19(c). The filing of an application for rehearing under subsection (a) shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

STATEMENT

This case involves the authority of the Federal Power Commission under section 7(c) of the Natural Gas Act to award reparations of amounts collected by Ocean Drilling & Exploration Company (ODECO) for sales of natural gas pursuant to unconditional permanent certificates of public convenience and necessity previously issued by the Commission.[1] At the outset it should be noted that ODECO is also a Respondent in Nos. 21, 22 and 32 which have been consolidated for argument with this case.[2] In these other appeals ODECO supports the decision below.

1. Permanent Certification of the Contracts with Hope Natural Gas Company

ODECO is a small independent producer[3] whose natural gas producing operations are confined to the Southern Louisiana area. In 1958 ODECO entered into two

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[1] Petitions for certiorari raising the reparations issue have been filed by J. R. Frankel, *et al* (No. 34), J. Ray McDermott & Co., Inc. (No. 35), and The Superior Oil Company (No. 36). The Court has not acted on these petitions.

[2] These cases are appeals from the decision of the court below by United Gas Improvement Co., *et al*, the Public Service Commission of New York, and the Federal Power Commission, respectively.

[3] According to "Sales by Producers of Natural Gas to Natural Gas Pipeline Companies — 1963" issued by the Commission in January 1965, ODECO's sales of natural gas (5,171,000 Mcf) were less than 1% of those by the largest producer, Phillips Petroleum Company (613,624,000 Mcf).

contracts with Hope Natural Gas Company which provide for an initial price of 21.5¢ per Mfc plus tax reimbursement of 2.05¢ per Mcf.[4] In accordance with section 7 of the Act and the regulations promulgated thereunder, ODECO sought certification of these sales. In Opinion No. 327 the Commission granted ODECO unconditional permanent certificates of public convenience and necessity authorizing the sales of gas to Hope at the proposed initial contract price (R. 116-41). The Commission expressly found that the record evidence supported the initial contract price as required by this Court in *CATCO*,[5] because "the prices are the same or lower than numerous other certificated sales in the area." (R. 134)

2. Judicial Review and the Proceedings on Remand

The Public Service Commission of New York (New York) sought judicial review of Opinion No. 327 but did not seek to stay its effectiveness. Accordingly, ODECO filed its contracts with the Commission as rate schedules and commenced deliveries of gas at the authorized price. The Court of Appeals for the District of Columbia[6] reversed the Commission because the record did not contain "the supporting evidence" required by *CATCO* to justify unconditional certification of ODECO's initial contract price. 287 F. 2d at 149. The court remanded the proceedings to the Commission to give the producers the further opportunity to augment the record to support unconditional certification of their contract prices.

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[4] The 2.05¢ per Mcf represents partial reimbursement of the 2.3¢ per Mcf State of Louisiana severance tax which ODECO is required to pay.

[5] *Atlantic Ref. Co.* v. *Public Serv. Comm'n*, 360 U.S. 378 (1959).

[6] *Public Serv. Comm'n* v. *FPC*, 287 F. 2d 146 (D.C. Cir. 1960), *cert. denied*, 365 U.S. 880 (1961).

After the mandate returned from the court of appeals the Commission, contrary to the procedure followed after the *CATCO* remand, did not issue ODECO temporary certificates containing refund conditions to replace the original permanent certificates. Instead, by order issued May 10, 1961 (R. 376-84) the Commission consolidated the remanded proceedings with the area rate proceeding applicable to sales from southern Louisiana.[7] The matter remained dormant until January 10, 1962, when the Commission issued an order warning ODECO[8] that at the conclusion of the remanded proceedings it intended, to the extent it was empowered to do so, to grant refunds of all amounts collected in excess of the price finally certificated (R. 395). In denying ODECO's application for rehearing of the January 10, 1962, order,[9] the Commission severed its certificate proceedings from the southern Louisiana area rate proceeding and consolidated them for hearing with other remanded producer-certificate proceedings (R. 410). Thereafter, hearings were held before a presiding examiner at which ODECO presented extensive evidence to support unconditional certification of its initial contract price. The examiner issued his decision on December 7, 1962 (R. 491). Appeals to the Commission were filed by various parties including ODECO.

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[7] During the interim between the issuance of Opinion No. 327 and the subsequent remand by the court of appeals, the Commission initiated area pricing by *Statement of General Policy No. 61-1,* issued September 28, 1960. 24 FPC 818 (1960).

[8] This was the first notice that ODECO had that the Commission intended to order retroactive refunds.

[9] ODECO sought judicial review of the January 10, 1962, order. By order issued September 20, 1963 the Court of Appeals for the Fifth Circuit dismissed ODECO's Petition for Review in No. 19663 "without prejudice to the rights of Petitioners to attack the validity of the orders herein involved in petition to review if timely and properly filed, the orders of July 17, 1963, in the Commission's opinion No. 398."

3. The Decision Below

In Opinion No. 398 (R. 549-93) the Commission adopted the Examiner's decision, with certain modifications not pertinent here. In particular, the Commission reissued permanent certificates to ODECO conditioned upon a total initial price of 20¢ per Mcf, including tax reimbursement. The Commission gave retroactive effect to the price reduction by ordering ODECO to refund all amounts collected in excess of the conditioned price from the date of initial delivery, plus 7% interest. Commissioner O'Connor dissented on the ground that he could not join "an unconditional order of refunds without provision for a retroactive price increase to effect evenhandedly the correction of the earlier error." (R. 589). On rehearing, the Commission granted the producers' request for a stay of the retroactive refund requirement. (R. 606-17)

ODECO filed a petition for review and application for a stay of the rate reducing portions of Opinion No. 398 in the Court of Appeals for the Fifth Circuit.[10] In its decision, the Fifth Circuit recognized that "Under the structure of the Act, it has long been recognized, and never questioned, that '* * * under the Act the Commission has no power to make reparation orders. . . .'" (R. 638). However, the court held, *inter alia*, that the Commission had "inherent power" to require refunds but that the Commission must first make a just and reasonable rate determination under either section 4 or 5 of the Natural Gas Act to ascertain the amount of the refund (R. 639-40). The court also held that the Commission erred in excluding all cost and economic evidence; that the Commission erred in imposing a price increase moratorium on ODECO's permanent certificates; and that the con-

[10] The stay was granted subject to certain conditions by order issued November 12, 1963, a copy of which is printed in Appendix A.

ditioning of the "take or pay" clauses in ODECO's contracts on a future decision in a pending rule-making proceeding was not presently reviewable. Because of its remand for a further hearing to receive all pertinent evidence, the court found it "need not express any view" on the questions raised by ODECO pertaining to the validity of the "in-line" price determination used by the Commission to support its 20¢ price condition (R. 641).[11]

The petitions in Nos. 21, 22 and 32[12] involve issues as to the latter holdings of the court below. The only issue to be decided on this appeal is: Does the Federal Power Commission have authority under section 7(e) of the Natural Gas Act to award reparations under the circumstances of this case. The pertinent circumstances are: ODECO received permanent certificates; New York sought judicial review and did not obtain a stay or other available judicial relief; the reviewing court reversed the Commission's order granting permanent certificates because of the lack of substantial evidence to support the rate; the Commission did not vacate ODECO's permanent certificates and issue temporary certificates with express refund conditions as it had done in other remanded cases; after hearings on remand the Commission awarded a lower rate; the Commission retroactively applied this lower rate by awarding reparation of amounts collected from the date of initial deliveries of gas until the date of the Commission's order.

SUMMARY OF ARGUMENT

1. Section 7 of the Natural Gas Act does not expressly authorize the Commission to order retroactive refunds or award reparations and such power cannot properly be

[11] The court also found "it inappropriate at this time to express any views as to interest or the rate, if interest is to be allowed." (R. 640).

[12] See footnote 2, *supra*.

implied. Under section 7 the Commission performs a legislative function and does not have inherent power to dispense equity. Further, the courts should not ascribe such inherent power to the Commission because there is an almost conclusive presumption against the power to take retroactive action unless Congress plainly specifies such power.

2. The statutory scheme of regulation under the Natural Gas Act and the equitable powers of the courts could have afforded sufficient protection to any party seeking review of the Commission's orders issuing unconditioned permanent certificates to ODECO.

Part of the amounts which the Commission ordered ODECO to refund were collected while judicial review instituted by New York was pending. During this period, from August 10, 1959, to April 24, 1961, the Commission's unconditional certificate orders became operative because under section 19(c)[13] of the Act, New York's appeal did not operate as a stay. Moreover, under the statutory scheme of regulation the statutory and equity powers of the courts to postpone the effective date of any agency action and to issue orders to preserve the *status quo* pending conclusion of judicial review were available to prevent ODECO from unconditionally collecting and retaining a rate which New York considered to be too high. Certainly, it was not incumbent upon ODECO to seek "interim protective relief" from the presumptively valid orders of the Commission granting unconditional permanent certificates.

After the court of appeals issued the mandate remanding the orders granting ODECO's unconditional permanent certificates, the Commission had authority under section 7 of the Act to provide additional protection.[14] The mandate

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[13] 15 U.S.C. § 717r.

[14] Of course, if New York had obtained a protective order pending its appeal, that order could have remained in effect until the Commission completed the remanded proceedings.

was issued by the court of appeals on April 24, 1961 and the Commission granted ODECO conditioned permanent certificates on July 17, 1963. During this period, April 24, 1961 to July 17, 1963, the Commission, on its own motion, could have vacated ODECO's original permanent certificates and issued new temporary certificates with appropriate prospective refund conditions. This is the procedure contemplated by the Act and was followed by the Commission upon receipt of the mandate in *CATCO* and other remanded certificate cases.

ARGUMENT

I.

THE FEDERAL POWER COMMISSION DOES NOT HAVE AUTHORITY UNDER SECTION 7 OF THE NATURAL GAS ACT TO ORDER RETROACTIVE REFUNDS

1. Rate Provisions of the Act

The Commission derives its powers with regard to the regulation of natural gas producers from the provisions of the Natural Gas Act. Sections 4, 5 and 7[15] of the Act set forth the standards to be used in regulating the rates charged by natural-gas producers. The interrelation of these three sections was summarized by Judge Skelly Wright in *Atlantic Ref. Co.* v. *FPC*, 316 F. 2d 677 (D.C. Cir. 1963) when he stated:

> "... Section 7 provides that '[n]o natural-gas company * * * shall engage in the transportation or sale of natural gas * * * unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations.' The burden of proving the public convenience and necessity is, of

[15] 15 U.S.C. §§ 717c, 717d and 717f, respectively.

course, on the natural gas company and, as indicated, the price of the gas is one of the prime considerations.

"Section 4 of the Act authorizes a natural gas company to increase the price of its gas, provided, of course, there is no limiting contract with the purchaser, but incorporates a mechanism for the recovery of the increase by the purchaser if the Commission, after hearing, disallows it. Unlike Section 7, Section 4 contemplates a full rate proceeding with the burden on the company to prove that the rate as increased is 'just and reasonable.' Section 5 also provides for a rate proceeding limited to testing the validity of an existing rate. A Section 5 proceeding is initiated by the Commission upon its own moton or upon complaint of parties interested in reducing the rate. As under Section 4, the 'just and reasonable' test is applied, but there is no mechanism for the refund of overcharges pending the proceeding and the burden of proof is on the Commission. In practice Section 5 has proved relatively ineffective because of the difficulty the Commission has experienced in controlling the length of the rate proceedings and there is no consumer protection during their pendency. Consequently, the burden of protecting the public interest has fallen on Sections 7 and 4 where the burden of proof is on the independent producer.

* * *

"In arriving at initial rates under Section 7, the Commission, of course, does not foreclose a company from obtaining an increase under Section 4. As indicated, Section 4 is a rate proceeding and Section 7 is not. But the public must be protected from the time the gas first enters interstate commerce. *Since there is no mechanism for refund of overcharges under Section 7,* if the Commission is to err in setting an initial rate, it should err on the low side because the company, under Section 4, can immediately increase the rate, subject to disallowance by the Commission after a full rate proceeding, the public being protected with reference to refund in the interim." (Footnotes omitted) (Emphasis supplied) 316 F. 2d at 678-79.

Section 4 of the Act provides that if the Commission suspends a proposed rate increase and later finds such increase unjustified, it may order refund of amounts previously collected pursuant to an express refund obligation. This is the only provision of the Act authorizing the Commission to require refunds. Under section 5 of the Act, the Commission may investigate existing rates, but if it finds them too high, its only power is to order that such rates be reduced prospectively. As a result, natural-gas companies are allowed to keep revenues obtained from past rates which are determined under section 5 to be excessive. In section 5, Congress had a unique opportunity to permit the Commission to set retroactive rates and award reparations as had been provided in the Interstate Commerce Act.[16] Instead, Congress confined the Commission to fixing rates "to be thereafter observed."

In the present case, the Commission isued certificates to ODECO pursuant to section 7 which empowers the Commission to issue certificates of public convenience and necessity for proposed natural gas sales found to be consistent with the public interest. However, as under section 5, the Commission is not granted the power under section 7 to order refunds or set retroactive rates. Instead, section 7(e) vests the Commission with prospective powers, providing that:

> ". . . a certificate shall be issued to any qualified applicant . . . if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed . . . and that the proposed service, . . . *is or will be required by the present or future public convenience and necessity;* otherwise such application shall be denied." (Emphasis supplied.)

From a practical standpoint, the circumstances in which the Commission's reduced ODECO's certificated

[16] 49 U.S.C. § 9.

rates on remand involved a typical section 5 situation. The Commission had approved ODECO's contract prices in Opinion No. 327. When ODECO commenced deliveries of gas, its permanent certificates and filed rate schedules, although being judicially challenged, became effective and constituted the requisite authority for such deliveries. *CAB* v. *Delta Air Lines, Inc.*, 367 U.S. 316 (1961). Until changed prospectively, the rate approved by the Commission was the existing legal rate which ODECO was required to charge and the pipeline was obligated to pay. In discussing analogous rate provisions of the Federal Power Act which were the genesis of similar provisions in the Natural Gas Act, this Court stated:

> "[A company] can claim no rate as a legal right that is other than the filed rate, whether fixed or merely accepted by the Commission, and not even a court can authorize commerce in the commodity on other terms." *Montana-Dakota Util. Co.* v. *Northwestern Pub. Serv. Co.*, 341 U.S. 246, 251 (1951).

When the Commission determined in Opinion No. 398 that the rate it had previously approved was too high, its only power was to set the rate "to be thereafter observed." Under the statutory scheme of regulation, it is immaterial whether the proceedings terminating in the rate reduction resulted from judicial reversal of unconditional certificates or a section 5 investigation instituted by the Commission on its own motion.

2. Under Section 7 the Commission's Powers Are Quasi-Legislative

It is well established that in approving rates administrative agencies perform a quasi-legislative function and, therefore, cannot award reparations on account of past rates. Thus, in *Arizona Grocery Co.* v. *Atchison, T. & S.F. Ry.*,

284 U.S. 370 (1932), this Court held that where an unreasonable rate has been prescribed by the Interstate Commerce Commission because of inadequate evidence or erroneous facts, there is no power to award refunds for the resulting exaction of unreasonable rates. The Court premised its decision on the legislative character of the rate and held when the Interstate Commerce Commission approves a maximum, reasonable rate:

> "[it] declares a specific rate to be the reasonable and lawful rate for the future it speaks as the legislature, and its pronouncement has the force of a statute." 284 U.S. at 386.

The Court then continued:

> "The carrier cannot charge a rate so prescribed and take its chances on an adjudication that the substituted rate will be found reasonable. It is bound to conform to the order of the Commission. If that body sets too low a rate the carrier has no redress save a new hearing and the fixing of a more accurate rate for the future. It cannot have reparation from the shippers for a rate collected under the order upon the ground that it was unreasonably low. This is true because the Commission in naming the rate, speaks in its quasi-legislative capacity." 284 U.S. at 387, 388.

> "As respects its future conduct, the carrier is entitled to rely upon the declaration as to what will be a lawful, that is, a reasonable, rate . . . the Commission . . . may not in a subsequent proceeding, acting in its quasi-judicial capacity, ignore its own pronouncement promulgated, in its quasi-legislative capacity and retroactively repeal its own enactment as to the reasonableness of the rate it has prescribed." 284 U.S. at 389.

In *Prentis* v. *Atlantic Coast Line Co.*, 211 U.S. 210 (1908), Mr. Justice Holmes described the difference between the legislative and judicial functions of an administrative agency as follows:

> "A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation, on the other hand, looks to the future and changes existing conditions by making a new rule, to be applied thereafter to all or some part of those subject to its power. The establishment of a rate is the making of a rule for the future, and therefore is an act legislative, not judicial. . . ." 211 U.S. at 226.

This fundamental distinction between quasi-legislative and quasi-judicial powers has been applied to the Commission's authority under the Natural Gas Act.[17] In *Hope Natural Gas Co.* v. *FPC*, 134 F. 2d 287 (4th Cir. 1943), the court held that the Commission was given only quasi-legislative powers and did not have "authority to fix rates for the past or to award reparations on account of past rates." The court stated:

> "The fundamental difference between quasi-legislative and quasi-judicial power is that the one is concerned primarily with prescribing regulations of the future, the other with determining rights in the light of what has occurred in the past. Cf. Baer Bros. v. Denver & R. G. R. Co., 233 U.S. 479, 486, 34 S. Ct. 641, 58 L. Ed. 1055. The Natural Gas Act shows clearly that it was the intention of Congress to give the Commission quasi-legislative power, i.e., regulatory power as to the future rates; but there is no indication of any intention to clothe it with judicial or quasi-judicial powers with respect to past charges or practices, such as was vested

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[17] The dichotomy between quasi-legislative and quasi-judicial powers has been determinative in numerous state cases involving the power of regulatory agencies to order retroactive refunds. See, *e.g.*, *Pacific Tel. & Tel. Co.* v. *Public Util. Comm.*, 401 P. 2d 353 (Cal. 1965); *Michigan Bell Tel. Co.* v. *Michigan Pub. Serv. Comm'n*, 315 Mich. 533, 24 N.W. 2d 200, 205-06 (1946); *Mandel Bros. Inc.* v. *Chicago Tunnel Terminal Co.*, 2 Ill. 2d 205, 117 N.E. 2d 774 (1954).

in the Interstate Commerce Commission by section 9 of the Interstate Commerce Act. 49 U.S.C.A. § 9. As the Commission itself says, it was not given authority to fix rates for the past or to award reparations on account of past rates. If it was not given the power to fix past rates, or award reparations based upon their unreasonableness, it certainly was given no power to do the same thing indirectly by making findings of fact as to past rates to be given effect in rate proceedings before state commissions. No intention on the part of Congress to vest any such unusual power in the Commission ought to be indulged unless conferred in the plainest terms; and not only it is not plainly given here, but such power cannot be spelled out of the statutes on any theory of interpretation with which we are familiar." 134 F. 2d at 309-10.

Reversing on other grounds, this Court in *FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591 (1944) acknowledged:

"... It is conceded that under the Act, the Commission has no power to make reparation orders. And its power to fix rates admittedly is limited to those 'to be thereafter observed and in force.'" 320 U.S. at 618.

See also *Montana-Dakota Util. Co.* v. *Northwestern Pub. Serv. Co.*, 341 U.S. 246 (1951); *T.I.M.E.* v. *United States*, 359 U.S. 464 (1959).

Even more pertinent to the present case is *Panhandle Eastern Pipeline Co.* v. *FPC*, 236 F. 2d 289 (3d Cir. 1956) where the court held that the Commission acts in a legislative capacity in proceedings which involve the issuance of certificates of public convenience and necessity under section 7 of the Act. In discussing the inapplicability of the principles of *res judicata* to section 7 certificate proceedings, the court noted that when the Commission determines issues under the standard of public convenience and necessity, it:

"... is exercising delegated legislative power to make a rule to guide the conduct of the parties in the future.

It is not exercising quasi-judicial power to determine past or present rights or liabilities. . . ." 236 F. 2d at 292.

This conclusion naturally follows from the fact that the Commission's power to issue certificates under section 7 is dependent upon its determination that the proposed sale is "required by the present or future public convenience and necessity." See *Pittsburgh* v. *FPC*, 237 F. 2d 741, 752 (D.C. Cir. 1956). Accordingly, when the Commission issued the conditioned certificates to ODECO at the conclusion of the remanded proceedings, it was exercising quasi-legislative powers and therefore did not have the authority to fix rates for the past or award reparations on account of past rates.

3. Presumption Against Power To Issue Retroactive Orders

The court below acknowledged that the Commission did not have power under the Natural Gas Act to issue reparation orders but proceeded to find "inherent power" which the Commission could exercise to order retroactive refunds in this case (R. 637-41). However, the court concluded that consumers were not entitled to less than a "just and reasonable" rate and, accordingly, held that the Commission could not order refunds until after a "just and reasonable" rate was established.[18] In finding this "inherent power,"

[18] The Commission ordered refunds in this case without any inquiry as to the effect of its order. It refused to consider any of the cost and economic evidence proffered by ODECO which would have shown the inequity in ordering retroactive refunds. The court below held that the Commission erred in excluding such evidence. This is one of the questions before this Court in Nos. 21, 22 and 32. Assuming *arguendo* that the Commission has "inherent power" to order refunds, it is ODECO's position that such a far-reaching decision should not be made blindly, but rather with a fully developed record showing the equities, particularly the economic impact on all parties involved.

the court did not cite the Natural Gas Act or any other authority. ODECO assumes that the court found the "inherent power" in the Act since the Commission has only the powers conferred upon it by statute.

As discussed above, the Commission was not granted the quasi-judicial power to dispense equity as if it were a court of law. As this Court has observed with respect to the powers of the Federal Trade Commission:

> "The Commission is an administrative body possessing only such powers as are granted by statute. It may make only such orders as the Act authorizes . . . but, that accomplished, (it) has not the additional powers of a court of equity to grant other and further relief . . . on the theory that this is necessary to render effective the prescribed statutory remedy. . . ." *Arrow-Hart & Hegeman Elec. Co.* v. *FTC*, 291 U.S. 587, 598 (1934).

See also *FTC* v. *Eastman Kodak Co.*, 274 U.S. 619, 623 (1927), where this Court pointed out that the Federal Trade Commission had not been delegated the authority of a court of equity and, accordingly, on review the court of appeals was limited to the question of whether the Commission properly exercised the administrative authority granted by statute, and could not sustain or award relief beyond the power of the Commission.

Further, there is a strong presumption that retroactive powers will not be implied but must be clearly expressed in the governing statute. Thus, in *Brimstone R.R. & Canal Co.* v. *United States*, 276 U.S. 104 (1928), this Court denied the retroactive operation of an administrative regulation promulgated by the Interstate Commerce Commission, stating:

> "The power to require readjustments for the past is drastic. It may reasonably exist [as specifically permitted by statute] in cases where the particular rate has been approved by the Commission after full hear-

> ing: it ought not to be extended so as to permit unreasonably harsh action without very plain words." 276 U.S. at 122.

Accord, United States v. *Baltimore & Ohio R.R. Co.*, 284 U.S. 195 (1931).

Likewise, in *Claridge Apartments Co.* v. *Commissioner*, 323 U.S. 141 (1944), this Court stated:

> "Retroactivity, even where permissible, is not favored, except upon the clearest mandate. It is the normal and usual function of legislation to discriminate between closed transactions and future ones or others pending but not completed." 323 U.S. at 164.

Similarly, this presumption against retroactivity was recognized in *Transcontinental & Western Air, Inc.* v. *CAB*, 169 F. 2d 893 (D.C. Cir. 1948), *aff'd*, 366 U.S. 601 (1949), where the Court said:

> "In the first place we are met with the almost conclusive presumption against the power to take retroactive action unless Congress plainly specifies such power." 169 F. 2d at 894.

The state courts have also held that this power of an administrative agency will not be implied in the absence of express statutory authorization. See, *e.g.*, *Mandel Bros., Inc.* v. *Chicago Tunnel Terminal Co.*, 2 Ill. 2d 205, 117 N.E. 2d 774 (1954). A prime example is *Michigan Bell Tel. Co.* v. *Michigan Pub. Serv. Comm'n*, 315 Mich. 533, 24 N.W. 2d 200 (1946), where the court was confronted with the contention that the Public Service Commission has implied powers to retroactively adjust rates previously fixed. The Michigan statutes vested the Commission with very broad powers but did not expressly permit retroactive refunds. In holding that the Commission did not have any such implied power, the Michigan Supreme Court stated:

> "For the state to prescribe utility rates, forbid the utility to charge any other rate, and then say that

those rates may be declared unjust and unreasonable as applied to executed transactions shocks the conscience. *Under such a rule how could the utility order its affairs?* . . . What then becomes of the commitments the utility may have made in the belief that the sums it has earned and collected belonged to it? Reason, common fairness and precedent combine to establish the rule that the charter of a commission's powers should not be construed to permit it to impugn its own legislative acts with retroactive effect unless the statutes affirmatively require such a construction." 24 N.W. 2d at 206. (Emphasis supplied.)

The logic in this presumption against retroactivity is irrefutable. The Natural Gas Act, like the other acts creating Federal regulatory agencies, provides a comprehensive scheme of regulation. Retroactive refund power is neither necessary nor desirable, since its effects are drastic and inconsistent with proper utility regulation. There must be some point — permanent certification — where the regulated company can rely upon Commission orders.

In summary, the Natural Gas Act does not give the Commission power to order retroactive refunds except under section 4, which is not applicable in this case. There is a strong presumption against retroactive power. The "inherent power" found by the court below does not exist. The only possible argument to support "inherent power" would be if the Act were somehow deficient in affording adequate protection to the consuming public, but as will be pointed out, the Act provides full protection to the consumer.

4. Policy Considerations Underlying the Lack of Retroactive Refund Power

There are sound policy reasons why the statutory scheme of regulation contained in the Natural Gas Act does not include the power to award retroactive refunds in a section 7 certificate proceeding. Producers of natural gas, like

other businesses, must pay federal income taxes, predict a cash flow, borrow money, pay expenses, meet payrolls, and unlike other businesses, pay royalty owners, state severance and production taxes, and reinvest funds in further exploration and development activities. As a practical matter, these day-to-day operations cannot be conducted if the producer is unable to rely upon unconditional permanent certificates granted by the Commission which have become effective. Once a producer is permitted to commence deliveries without refund condition, he and everyone else should be entitled to rely upon the authorized rate until prospectively changed by the Commission. If the authorized rate is subsequently determined to be too low, a higher rate cannot be retroactively imposed. See *Arizona Grocery Co.* v. *Atchison T. & S.F. Ry. Co.*, 284 U.S. 370 (1932). The converse is likewise true: when the authorized rate is subsequently determined to be too high, it cannot be retroactively reduced by awarding reparations.

Nor should an appeal of the order authorizing the rate be of significance. Under the statutory scheme of regulation if the complaining party wishes to impose a refund condition, he must obtain a stay or other protective order from the courts. To hold that in the absence of such an order a producer may not rely upon a permanent certificate granted by the Commission merely because it is being appealed would clothe the appealing party with regulatory powers vested exclusively in the Commission and the courts. Such a holding would require the producer to rely upon the allegations of an appealing party rather than the presumptively valid order of the Commission. Certainly a producer cannot be expected to paralyze his business during such an appeal.[19]

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[19] As exemplified by the present case, such appeals of administrative orders and remanded proceedings are extremely lengthy and may take more than five years.

The need for certainty as to the effect of Commission orders is obvious. Without it long range planning is impossible, as are financing arrangements which must necessarily rely on the efficacy of Commission orders as to transactions consummated thereunder. The lack of certainty creates serious operating problems for all producers, but they are particularly acute for the small producer. He cannot assume the risk of irrevocably committing his gas to interstate commerce without knowing what part of the price he will ultimately be allowed to retain. In many cases the subject sales constitute a substantial portion of his prospective income. Thus, a small producer may be required to forego making sales authorized by the Commission until the appeal procedures are exhausted. This would place him at a serious competitive disadvantage with the larger producers who can commence deliveries and assume the risk of unknown retroactive refunds.

In short, the producer of natural gas must know the terms and conditions when he commits his gas to interstate commerce. In *Sunray Mid-Continent Oil Co.* v. *FPC,* 270 F. 2d 404 (10th Cir. 1959), the court held unlawful an express refund condition which obligated the producer to refund the difference between the initial contract price and whatever price the Commission ultimately found when a permanent certificate was issued. The court held that the Commission must either approve, reject or conditionally approve an application for a temporary certificate in such a manner as to permit the producer to make an informed judgment as to whether to dedicate his natural gas to interstate commerce. The rationale of *Sunray* is equally applicable in the situation where the Commission attempts to exercise retroactive refund power under section 7 in a remanded certificate proceeding. In the instant case the requirement of certainty which is necessary under the

Natural Gas Act would be clearly denied if the Commission could award retroactive refunds of amounts collected under permanent certificates.

II.

THE NATURAL GAS ACT PROVIDED A COMPLETE AND EFFECTIVE BOND OF PROTECTION FOR THE CONSUMER

On many occasions this Court has stated that the purpose of the Natural Gas Act is to "afford consumers a complete, permanent and effective bond of protection from excessive rates and charges." *Atlantic Ref. Co.* v. *Public Serv. Comm'n,* 360 U.S. 378, 388 (1959); *Wisconsin* v. *FPC,* 373 U.S. 294, 309-10 (1963). It is ODECO's position that the scheme of regulation contemplated by the Act provided such complete protection in this case. As detailed below statutory remedies were available; they simply were not utilized. The Commission should not be allowed to compensate for this failure to pursue these statutory procedures by belatedly awarding reparations.

1. The Availability of a Stay and Other Judicial Orders Provided Protection During the Pendency of New York's Appeal

The Commission issued Opinion No. 327 granting ODECO permanent certificates of public convenience and necessity on August 10, 1959 (R. 116-41). On September 8, 1959, New York filed a motion for rehearing alleging that the Commission erred by failing to condition ODECO's certificate to provide for a price of 18¢ per Mcf (R. 142-52). Rehearing was denied by the Commission on October 7, 1959. ODECO began deliveries to Hope on December 1, 1959. New York filed a petition for review in the Court of Appeals

for the District of Columbia Circuit on December 4, 1959, but did not ask that the Commission's order be stayed or for any other protective relief pending the conclusion of judicial review.

On December 8, 1960, the Court of Appeals for the District of Columbia Circuit reversed the Commision and remanded the proceedings to the Commission to give ODECO the opportunity to augment the record to support its contract prices.[20] On April 17, 1961, the Supreme Court denied petitions for writs of certiorari and on April 24, 1961, the Court of Appeals for District of Columbia Circuit issued its mandate. During this period December 1, 1959, until April 24, 1961, — *16 months* — the aggrieved party, New York, had an adequate and available remedy to prevent ODECO from unconditionally collecting and retaining a rate which New York considered to be too high. However, New York chose not to avail itself of the protection afforded by a stay or other protective judicial relief. As a result, on remand, New York urged that the Commission assume the power to order retroactive refunds. Eventually the Commission did assume this power although Congress did not grant retroactive refunding power to it under section 7 of the Natural Gas Act and such power is not necessary since the Act considered in conjunction with the powers of the Commission and courts provides adequate protection for parties contesting rates.[21]

Section 19(c) of the Natural Gas Act[22] provides in part:

> "The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered

[20] *Public Serv. Comm'n* v. *FPC*, 287 F. 2d 146 (D.C. Cir. 1960) *cert. denied*, 365 U.S. 880 (1961).

[21] Indeed, this Court has recognized that refunds are a "somewhat illusory" device of consumer protection. *FPC* v. *Tennessee Gas Transmission Co.*, 371 U.S. 145, 154 (1963).

[22] 15 U.S.C. 717r.

> by the court, operate as a stay of the Commission's order."

However, this does not preclude an appealing party from obtaining necessary orders to protect its position while the appeal is pending. Section 10d of the Administrative Procedure Act[23] provides:

> "Upon such conditions as may be required and to the extent necessary to prevent irreparable injury, every reviewing court (including every court to which a case may be taken on appeal from or upon application for certiorari or other writ to a reviewing court) is authorized to issue all necessary and appropriate process to postpone the effective date of any agency action or to preserve status or rights pending conclusion of the review proceedings."

In *Scripps-Howard Radio, Inc.* v. *FCC,* 316 U.S. 4 (1941), this Court held that regardless of the Administrative Procedure Act or the silence of the Federal Communications Act, the courts have inherent power to issue a stay:

> ". . . it is reasonable that an appellate court should be able to prevent irreparable injury to the parties or to the public resulting from the premature enforcement of a determination which may later be found to have been wrong. It has always been held, therefore, that, as part of its traditional equipment for the administration of justice, a federal court can stay the enforcement of a judgment pending the outcome of an appeal." 316 U.S. at 10.

A stay of a regulatory agency's rate-making order pending judicial review and retroactive refund powers are mutually exclusive remedies for parties attacking the validity of a utility's rates. See, *e.g., Keco Indus., Inc.* v. *Cincinnati & Suburban Bell Tel. Co.,* 166 Ohio St. 254, 141

[23] 5 U.S.C. 1009(d).

N.E. 2d 465 (1957); *Mandel Bros., Inc.* v. *Chicago Tunnel Terminal Co.*, 2 Ill. 2d 205, 117 N.E. 2d 774 (1954). *Keco* arose because an order of the Ohio Commission *increasing* the telephone company's rates was reversed on appeal. After the mandate returned Keco Industries brought suit to recover the increased rates collected during the pendency of the appeal. The Ohio Supreme Court pointed out that the Ohio statutes provided that the filing of an appeal did not operate as a stay of the Ohio Commission's order and that the utility must continue to collect the rates set by the Commission. These provisions are practically identical to those found in the Natural Gas Act. The Ohio Court then held that since the Ohio General Assembly had provided a method whereby rates could be suspended pending judicial review (stay) there could be no recovery of increased rates collected during the pendency of the appeal, stating:

> "Common sense and reason lead us to a wholehearted endorsement of the conclusion, as is so well stated as follows in the opinion of Judge Hoy . . . :
>
> 'It may seem inequitable to permit the defendant to retain the difference in the rates collected under the May 28, 1953 order, of the commission and the rates finally fixed by the commission on June 4, 1954, but absolute equity in a particular case must sometimes give way to the greater overall good. In adopting a comprehensive scheme of public utility rate regulation the Legislature has found it impossible to do absolute justice under all circumstances. For example, under present statutes, a utility may not charge increased rates during proceedings before the commission seeking same and losses sustained thereby may not be recouped. Likewise, a consumer is not entitled to a refund of excessive rates paid during proceedings before the commission seeking a reduction in rates. Thus, while keeping its broad objectives in mind, the Legislature has attempted to keep the equities between the utility and the consumer in balance but has not found it possible to do absolute

equity in every conceivable situation.' " 141 N.E. 2d at 469.

Stays are frequently employed by parties appealing from rate orders of the Federal Power Commission. *Natural Gas Pipeline Co.* v. *FPC,* 128 F. 2d 481 (7th Cir. 1942) involved the disposition of a fund collected while a stay order was in force. The Commission had ordered a reduction of Natural's rates and pending judicial review Natural obtained a stay upon the condition that it file a bond of $1,000,000 in favor of the Commission and the Illinois Commerce Commission. Subsequently, this Court affirmed the Commission's rate reduction.[24] After affirmance the parties disagreed on the disposition of the fund created during the stay. In its second opinion, the Seventh Circuit concluded that it had the ancillary power to do complete justice as to the interests of all parties in the fund since the fund grew out of the court's equity jurisdiction.[25]

FPC v. *Interstate Natural Gas Co.,* 336 U.S. 577 (1949) illustrates the flexibility of stay orders which may be conditioned to permit the collection of challenged rates and at the same time afford protection to the appealing party. That case involved the disposition of a fund accumulated under a stay order issued by a court of appeals pending review of an order of the Commission reducing the rates of Interstate Natural Gas Co. Pursuant to the terms of

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[24] *FPC* v. *Natural Gas Pipeline Co.,* 315 U.S. 575 (1942).

[25] *Natural Gas* and the instant case differ from *Wilson & Co., Inc.* v. *FCC,* 335 F. 2d 788 (7th Cir. 1964), *cert. granted,* ..... U.S. ....., 1965 (No. 909, 1964 Term; renumbered No. 56, 1965 Term), where the question involved is whether the Seventh Circuit had a duty in equity once it had sustained the FCC's rate orders on the merits to require the carrier to return to customers excess rates *collected under a stay* during pendency of the appeal. In *Wilson,* unlike the present case, the parties sought a stay conditioned in a manner which would protect the consumer from paying an excessive price.

the court of appeals' stay order, the natural-gas company was required to deposit with the court the monthly difference between the payments under the existing rates and those required under the order of the Commission.[26]

In the court below, New York sought to justify its failure to seek the obvious protection afforded by a stay order by questioning whether it could have obtained a stay under the test stated in *Virginia Petroleum Jobbers Ass'n* v. *FPC*, 259 F. 2d 921 (D.C. Cir. 1958) and asserting that "the present petitioners proceeded at their own risk and cannot point to their self-inflicted losses as a ground for frustrating the judicial reversal of unconditioned certificates."[27] Apparently the first argument evolves thusly: New York would have been unsuccessful had it requested a stay; since New York could not have obtained a stay, there was no protection afforded by a stay, *ergo*, there was some additional power under the Natural Gas Act that would protect New York if its appeal was successful.[28] Quite apart from the fact that New York is now attempting to argue what might have occurred if a request had been made, it is obvious that New York could have obtained a stay in this instance. Four standards for obtaining a stay were reiterated in *Virginia Petroleum Jobbers Ass'n* v. *FPC*: First, the likelihood that petitioner will prevail on the merits on appeal (New York won on appeal which was brought because of this Court's *CATCO* decision); second, there will be irreparable injury to the petitioner unless a stay is granted (if the stay was not granted New York and the persons whom it represents would forever lose any "excessive" rates col-

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[26] See also *Socony Mobil Oil Company, Inc.* v. *Brooklyn Union Gas Co.*, 299 F. 2d 692 (5th Cir.), *cert. denied*, 371 U.S. 887 (1962); *State Corp. Comm'n* v. *FPC*, 215 F. 2d 176 (8th Cir. 1954); *Panhandle Eastern Pipe Line Co.* v. *FPC*, 179 F. 2d 896 (8th Cir. 1950).

[27] Brief for Intervenors in the Fifth Circuit, p. 21.

[28] New York assumes the same status as any other litigant including sustaining its burden of proof in proper situations such as seeking a stay order.

lected during the pendency of the appeal); third, no substantial harm to other persons; and fourth, where lies the public interest? The obvious harm to ODECO would have been the loss in revenue pending appeal. The loss to the general public would have been the failure to obtain needed gas supplies. However, these potential losses could have been equitably balanced against New York's challenge of the permanently certificated price by a stay order similar in theory to the orders in the cases previously cited. The court could have allowed ODECO to collect the rates granted in Opinion No. 327 during appeal and either pay the difference between the rate collected and the rate contended for by New York into escrow, or alternatively, require ODECO to collect a portion of its price subject to refund in the event New York prevailed on appeal and a lower rate was determined in the remanded proceedings. New York would have been protected on the rate question; the consumer would have received the benefits of needed gas supplies; and ODECO would have been permitted to make an informed determination of whether to dedicate its gas to interstate commerce on such terms and conditions.[29] *Sunray Mid-Continent Oil Co.* v. *FPC,* 270 F. 2d 404 (10th Cir. 1959). In addition, any party is entitled to file a motion requesting that a particular case be given preferential treatment on the court's docket because of the exigencies of the particular situation.

The instant case provides an excellent example of the ingenuity exercised by the courts in granting stays of Commission rate-making orders. The producers in the court below filed motions for stays with the Commission after the issuance of Opinion No. 398, requesting that the Commission issue a stay of the portions of its order requiring a rate reduction, a price moratorium, and refunds. In Opinion No. 398-A the Commission granted the stay for a period of thirty days after the conclusion of judicial

[29] ODECO would have had *notice* of its potential refund obligation and could have paid taxes, royalties, etc. accordingly.

review as to the portion of the order requiring refunds. (R. 606-17 at 615). However, the Commission refused to issue a stay of its rate reduction. Accordingly, when ODECO filed its petition for review with the Fifth Circuit, it also requested a stay of the portion of the Commission's order requiring rate reductions. On November 12, 1963, the Fifth Circuit granted ODECO's request for a stay with several conditions.[30]

The court below adopted New York's second excuse for failing to obtain a stay of the Commission's order in Opinion No. 327, *i.e.*, that the producers took the risk in commencing deliveries while their certificates were under judicial attack and should have sought interim protective relief from the Commission.[31] But the conclusion that ODECO took such a risk is nothing more than a "bootstrap" argument for it necessarily assumes that the Commission has retroactive refund power. This argument equates judicial attack with stay orders. If New York and the Fifth Circuit's thesis that the Commission has retroactive refund power is accepted then, of course, theoretically ODECO commenced deliveries knowing it might ultimately have to make refunds. But the existence of such extraordinary power is the very issue raised by ODECO on this appeal. The first time the Commission asserted such retroactive power was January 10, 1962, *two years after* ODECO commenced deliveries. However, as discussed above, the Commission has no retroactive refund power — thus ODECO did not take a risk as to price in commencing deliveries.[32]

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[30] A copy of this stay order is attached as Appendix 'A'.

[31] What interim protective relief? ODECO had a presumptively valid order which became operative unless stayed by the courts.

[32] ODECO did take a risk in dedicating its gas to interstate commerce since if the certificates were reversed it could not abandon deliveries without the express permission of the Federal Power Commission. ODECO also took the risk that if it expended any sums to effect deliveries they could not be recovered if after reversal the Commission refused further certification.

2. The Commission's Power to Issue Temporary Certificates Subject to a Refund Condition Provided Protection After Remand

The mandate following the reversal of Opinion No. 327 issued from the Court of Appeals for the District of Columbia Circuit on April 24, 1961. By motion dated June 21, 1961, New York asked the Commission to require ODECO and the other producers to file a bond to insure payment of any sums which "may have been and which may, in the interim, be collected unlawfully." New York asserted in the motion that under the provisions of Section 7(b) of the Natural Gas Act, ODECO's deliveries must continue; "however, notwithstanding the absence of any *valid,* outstanding certificate authority therefor, permanent or temporary, these deliveries have been and continue to be made at the very initial price levels authorized by the *invalid* certificate orders which were overturned solely because of lack of evidence to support the propriety of such prices." On July 10, 1961, in other remanded producer proceedings, Long Island Lighting Company, Philadelphia Electric Company, Public Service Electric Company and The United Gas Improvement Company (Long Island, *et al*) likewise filed a "Motion Requesting Commission to Provide Interim Consumer Protection in Compliance with Judicial Mandates." These companies were intervenors in the cases which resulted in reversals in this Court,[33] the Ninth Circuit,[34] and the Fifth Circuit.[35] Long Island, *et al* took the unqualified position that

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[33] *Public Serv. Comm'n* v. *FPC,* 361 U.S. 195, *vacating, United Gas Improvement Co.* v. *FPC,* 269 F. 2d 865 (3d Cir. 1959).

[34] *United Gas Improvement Co.* v. *FPC,* 283 F. 2d 817 (9th Cir. 1960) *cert. denied,* 365 U.S. 879 (1961).

[35] *United Gas Improvement Co.* v. *FPC,* 290 F. 2d 133 (5th Cir.) *cert. denied,* 368 U.S. 823 (1961); *United Gas Improvement Co.* v. *FPC,* 290 F. 2d 147 (5th Cir.), *cert. denied,* 366 U.S. 965 (1961).

the reversals vacated and set aside the Commission orders and that, "there can be little doubt that the producers under existing law are under a current obligation to refund any amounts ultimately found unlawful". Long Island, *et al* particularly expressed concern about Commission counsel's postion on brief in the Ninth and Fifth Circuits[36] stating:

> "It is possible that under Commission counsel's position (which we, of course, dispute, fn. 7), any amounts in excess of the price ultimately authorized for these sales *could not* be refunded as matters now stand."

Long Island, *et al* requested that the producers be required to file bonds or undertakings covering their alleged potential refund obligation back to the date of initial deliveries.

On July 27, 1961, the Commission issued an order vacating the permanent certificates previously issued to Socony Mobil Oil Company, Inc. in Opinion No. 315[37] which was reversed by this court in *Public Serv. Comm'n* v. *FPC,* 361 U.S. 195 (1959). The Commission took notice of New York's June 22, 1961 motion but stated that, "it would be unfair and unwise to redetermine Socony Mobil's application on the record as originally made." The Commission further stated:

> "Such redetermination cannot immediately be accomplished. In the interim, in view of Socony Mobil's obligations under Section 7(b) of the Act to continue service, we shall temporarily authorize continuation of sale herein, so that Socony Mobil will not be in violation

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[36] Cited fn. 35, 36, *supra.*

[37] Long Island, *et al* were parties to this proceeding. 20 FPC 264 (1958). This opinion, known as the *Transco-Seaboard* decision was subsequently consolidated with other certificate applications including ODECO's. The consolidated proceeding culminated in Opinion No. 398. Placid Oil Co., J. R. Frankel and Hassie Hunt, Respondents in Nos. 21, 22 and 31 in this Court are the only litigants remaining from that proceeding.

of Section 7(c) of the Act. We thereby recognize that Socony Mobil commenced deliveries in good faith.

"It is also reasonable, and the public convenience and necessity requires, that we condition our temporary authorization, as we did in the remanded *CATCO* proceedings (Docket Nos. G-11024, *et al.*), to protect the consumers of this gas but without prejudice to such final disposition of the application for a permanent certificate as the record may require. In so doing we shall grant Public Service Commission's request in part; we see no necessity, however, for requiring a bond or a corporate undertaking of Socony Mobil."[38]

The Commission then issued a temporary certificate stating in part:

"Temporary authorization be and is hereby issued to Socony Mobil Oil Company, Inc. in Docket No. G-13780 upon the condition that the rates charged shall be subject to such conditions as the Commission shall lawfully prescribe in issuing a permanent certificate in Docket No. G-13780, including any provision for refund thereby imposed."[39]

This procedure was consistent with the Commission's action after the *CATCO* reversal in June, 1959. The Third Circuit issued its mandate in accordance with this Court's opinion on November 16, 1959. On November 17, 1959, the Commission issued temporary certificates to the *CATCO* producers "upon the condition that the rates charged shall be subject to such conditions as the Commission shall lawfully prescribe in issuing a permanent certificate in Docket No. G-11049, including any provision for refund thereby imposed." The temporary certificates also provided that

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[38] The Commission was referring to New York's June 21, 1961 motion, previously noted.

[39] 26 FPC 203 (1961).

they would "be effective upon issuance of the court mandate."[40]

During this same period, June-August, 1961, the mandates from the Fifth[41] and Ninth Circuits[42] resulting from decisions reversing Commission orders granting certificates to The Superior Oil Company returned to the Commission. The Commission order, reversed by the Ninth Circuit, involved a sale by Superior to United Gas Pipe Line Company from the Block 76 Field in offshore Louisiana. After the mandate returned, Superior discontinued these deliveries and requested temporary authorization to resume the sales. By letter dated June 5, 1961, the Commission granted the temporary authorization with a refund condition in language quite similar to the *CATCO* temporary certificates (R. 384-85).

The order authorizing Superior's sale to Transcontinental Gas Pipe Line Corporation was reversed by the Fifth Circuit and Superior made a similar request for a temporary certificate on July 3, 1961. The Commission answered this request by telegram in which they stated that cessation of the sale had not been authorized and that "deliveries should be immediately resumed." (R. 385-386) Thereafter, various letters, the effect of which is disputed, were exchanged between Superior and the Federal Power Commission, but in any event on August 2, 1961, the Commission issued a temporary certificate with a refund condition similar to the *CATCO* certificates. (R. 388)

Finally, since the Commission had not acted on New

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[40] The temporary certificate issued to Tidewater Oil Company, one of the *CATCO* producers, is attached as Appendix B.

[41] *United Gas Improvement* v. *FPC*, 283 F. 2d 817 (9th Cir. 1960), *cert. denied*, 365 U.S. 879 (1961).

[42] *United Gas Improvement Co.* v. *FPC*, 290 F. 2d 147 (5th Cir.), *cert. denied*, 366 U.S. 965 (1961).

York or Long Island, *et al's* motions, Hope Natural Gas Company, the purchaser of ODECO's gas, filed a petition for a declaratory order. Hope stated that it had continued to pay for the gas involved in this proceeding at the prices made effective by the Commission in Opinion No. 327 and further stated that New York's June 21, 1961 motion had created an uncertainty. Hope asked the Commission to issue a declaratory order clarifying its position.

The Commission vacillated[43] until January 10, 1962,[44] when it issued an order in response to New York, Long Island, *et al,* and Hope's motions. The Commission reiterated the history of the proceedings stating at the outset:

> "In each of the above-captioned dockets we have heretofore issued unconditional permanent certificates of public convenience and necessity under Section 7(c) of the Natural Gas Act. *These certificates are still outstanding,* but the proceedings are before us again as a result of either a judicial remand of our own grant or rehearing for the purpose of reconsideration, upon applications therefor duly filed under Section 19(a) of the Act." (Emphasis supplied). (R. 395)

The Commission noted in *Socony Mobil Oil Co., Inc.,* 26 FPC 203 (1961), it had been confronted with the same problem and had set aside Socony's permanent cer-

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[43] It is now clear that the Commission was having difficulty in resolving the hiatus created by the court's reversal for inadequate evidence to support a price and the reliance by all parties on the permanent certificate as authority for continuing service. See the Commission's Brief in the Fifth Circuit, p. 45 fn. 61.

[44] Twelve days after the January 10, 1962 order the Commission issued Opinion No. 351, the *"CATCO* remand". In that opinion, the Commission pointed out that it had issued temporary certificates with refund requirements on November 17, 1959, to the *CATCO* producers and stated that these *CATCO* producers had no choice whether to accept or reject the temporary certificates. 27 FPC 96 at 110 (1962).

tificate and issued temporary authority properly conditioned. The Commission concluded, however, that it was unnecessary to set aside ODECO's permanent certificates. The basis for the change in the Commission's procedure is shown in the following language:

> "We have concluded, as to all rates collected by the applicants for the sales involved in these proceedings, that we should explicitly impose upon each applicant, to the extent that we are empowered to do so, an obligation to refund any amounts collected in excess of the amounts which would have been collected under the rate or rates finally determined in these proceedings to accord with the requirements of the public convenience and necessity.
>
> "We find ample authority under Section 7, 16, and 19 of the Act so to protect the public interest, pending final disposition of the initial price questions herein. The producer-applicants have no vested rights to receive the benefits of an order issued by the Commission once such order has been remanded to the Commission because its findings could not be supported under existing law. Securities & Exchange Commission v. Chenery Corporation, et al, 332 U.S. 194; Federal Communications Commission v. Pottsville Broadcasting Company, 309 U.S. 134, 145." (R. 398)

The Commission dismissed Hope's petition for a declaratory order pointing out that neither New York nor Long Island, *et al* had answered the petition or challenged the propriety of Hope's continuing to make payments in accordance with the contract rates filed by ODECO and the other producers.[45]

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[45] On brief in the Fifth Circuit, the Commission characterized its January 10, 1962 order as "merely declarative of the existing legal status". Brief p. 47. The Fifth Circuit summarily belittled the order by stating: "In our view, the order has no significance one way or the other." (R. 638).

Of course, there would never have been a problem if New York and Long Island, *et al* had followed the procedure commonly used by litigants contesting Commission orders approving rates. But since they failed to obtain a stay or other judicial relief, the Commission was faced with a dilemma created because courts do not prescribe proper rates when a regulatory agency's rate order is reversed. The ultimate holding of a court which reverses rate orders is either that the regulatory body applied incorrect principles in arriving at a rate or that there is no substantial evidence in the record before the court to support the rate. The court then remands the proceedings to the agency for a further hearing on the rate issue. The Commission is free to find a lower rate, the same rate or even a higher rate as long as it does so within the ambit of its statutory power and consistently with the principles enunciated by the reviewing court and as long as there is substantial evidence in the record to support the rate. The rate is not changed until the agency entrusted with regulating rates issues its order after remand.

When the mandate returned from the Court of Appeals, for the District of Columbia, ODECO and other producers maintained that the certificates were still valid until set aside by the Commission and that they should continue to collect the rate provided in the certificates until the certificates terminated or the rate was changed. The Commission agreed with this position (R. 395-405), but instead of vacating the certificates as it had done before in similar situations, it later decided to rely on whatever power it had to order retroactive refunds.

Even though New York failed to obtain a stay or other protective order during the pendency of its appeal, the Commission upon receipt of the mandate had a remedy

provided by the Natural Gas Act which would have permitted prospective refunds *from the time of the return of the mandate until it had had an opportunity for full review of a new record.* The Commission could have issued an order setting aside the permanent certificates previously issued to ODECO on the basis of the decision rendered by the reviewing court. After setting aside the permanent certificates, the Commission could then have issued temporary certificates with prospective refund conditions to ODECO to allow it to continue to make the sales.[46] The prospective refund condition, to be consistent with the *Sunray*[47] decision, should have contained a definite floor, *i.e.,* ODECO would have been obligated to refund any amounts collected in excess of 18¢, the price level urged by New York. A temporary certificate is issued if an emergency exists.[48] An emergency did exist at that time because the Commission was unable to immediately commence hearings to once again determine the public convenience and necessity rate. This procedure would have been workable and eminently fair to all concerned. ODECO would have realized from the beginning its possible maximum refund liability and could have planned accordingly. New York would have been protected since if it prevailed in urging a lower price, the Commission could order refunds.[49] However, the most attractive feature of this procedure is that it is authorized by the Natural Gas Act, while the retroactive refund method is not.

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[46] This procedure was followed in the remanded *CATCO* proceedings. See Appendix B, hereto.

[47] *Sunray Mid-Continent* v. *FPC,* 270 F. 2d 404 (10th Cir. 1959).

[48] "That the Commission may issue a temporary certificate in cases of emergency . . ." 15 U.S.C. 717f(c).

[49] In addition neither the producer nor the consumer would benefit from "administrative delay".

CONCLUSION

For these reasons, it is respectfully requested that the opinion below be vacated insofar as it affirms the Commission's power to order ODECO to refund amounts previously collected pursuant to the unconditional permanent certificates issued by Opinion No. 327 and that the United States Court of Appeals for the Fifth Circuit be directed to reverse the Commission's order directing ODECO to make such refunds.

Respectfully submitted,

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APPENDIX A

U. S. Court of Appeals
FILED
Nov. 12, 1963
Edward W. Wadsworth
Clerk

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 20989

OCEAN DRILLING & EXPLORATION COMPANY,
Petitioner,

v.

FEDERAL POWER COMMISSION,
Respondent.

STAY ORDER

Before TUTTLE, Chief Judge, and RIVES and GEWIN, Circuit Judges.

PER CURIAM:

We are controlled by the precedent set by this Court in the orders filed October 17, 1963, in No. 20872, Callery Properties, Inc. v. F.P.C., and in No. 20885, The Superior Oil Company v. F.P.C., granting stay of paragraphs (B) and (C) of the order of the Federal Power Commission issued July 17, 1963, accompanying its opinion No. 398.

It is therefore ORDERED by the Court that, upon motion of petitioner, paragraphs (B) and (C) of the Federal Power Commission's order of July 17, 1963, which is complained of by the petition in this proceeding, ordering, respectively,

a reduction in rates to 20¢ per Mcf and a moratorium on the filing of increased rates in excess of 23.55¢, are hereby stayed pending the further order of the Court, upon the following conditions.

(A) In the event and to the extent that the Commission's order is affirmed by final judgment in this proceeding (or, pursuant to remand, is duly confirmed in whole or in part by further lawful order of the Commission), petitioner shall refund to its respective pipeline purchasers, at petitioner's expense:

(1) Any amounts, together with simple interest at 7% per annum until repaid, collected for the sales of gas here involved which are in excess of the amounts it would have been permitted to charge, absent a stay, under the terms of the Commission's order; and

(2) Any amounts collected under any increased rates which petitioner shall duly file with the Commission pursuant to Section 4(d) of the Natural Gas Act, 15 U.S.C. 717c(d), which it is prohibited from filing under the terms of the Commission's order, but for this stay, and which shall be collected in accordance with such lawful orders as the Commission shall issue with respect to such filings under Section 4(e) of the Act, 15 U.S.C. 717c(e), together with simple interest thereon at the rate of 7% per annum until repaid.

Such amounts, however, shall be paid to and held by the purchaser pipelines for the benefit of themselves or of such class of direct or indirect customers as shall have borne the burden, substantially, of the excess collections.

(B) Simultaneously, with the filing of any increased rate above 23.55¢ per Mcf, petitioner shall submit to the Commission all the material upon which it relies in justification of such increased rate filing, in a form which will constitute its case in chief in support of such rate at a Commission hearing to determine the lawfulness thereof.

APPENDIX B

Address All Communications
To The Secretary

FEDERAL POWER COMMISSION
WASHINGTON 25

Docket No. G-11049
Tidewater Oil Company

AIRMAIL

Nov. 17, 1959

Tidewater Oil Company
P. O. Box 1404
Houston 1, Texas

Attention: Wm. H. Vaughan, Manager
Gas Utilization

Gentlemen:

Temporary authorization is hereby issued to Tidewater Oil Company in Docket No. G-11049 upon the condition that the rates charged shall be subject to such conditions as the Commission shall lawfully prescribe in issuing a permanent certificate in Docket No. G-11049, including any provision for refund thereby imposed.

This authorization shall be effective upon issuance of the court mandate in *Public Service Commission of the State of New York* v. *Federal Power Commission* and *Long Island Lighting Company and Public Service Electric and Gas Company* v. *Federal Power Commission,* Nos. 12,401 and 12,403 (C.A.3d).

This is without prejudice to such final disposition of the application for certificate as the record may require.

By direction of the Commission.

/s/ J. H. Gutride
Secretary

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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 21

THE UNITED GAS IMPROVEMENT COMPANY, ET AL., PETITIONERS

v.

CALLERY PROPERTIES, INC., ET AL.

No. 22

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, PETITIONER

v.

CALLERY PROPERTIES, INC., ET AL.

No. 26

OCEAN DRILLING & EXPLORATION COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION, ET AL.

No. 32

FEDERAL POWER COMMISSION, PETITIONER

v.

CALLERY PROPERTIES, INC., ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit (R. 620–642) is reported at 335 F. 2d 1004. The opinions of the Federal Power Commission, Opinions Nos. 398 (R. 649) and 398A (R. 606), are published at 30 FPC 283 and 682.

JURISDICTION

The judgment of the court of appeals reversing the Commission's order and remanding the proceedings was entered on August 14, 1964 (R. 643). Orders were issued on November 6 and 12, 1964, extending the time for filing petitions for writs of certiorari in Nos. 26 and 32 until November 23 and December 12, 1964, respectively. The petitions were filed on November 10 (No. 21), November 12 (No. 22), November 23 (No. 26) and December 11, 1964 (No. 32). Orders were entered granting the petitions in all four cases on March 8, 1965 (R. 645–647). 380 U.S. 931.

The jurisdiction of this Court rests on 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

STATUTES INVOLVED

The pertinent provisions of the Natural Gas Act (Sections 4 and 7 (c) and (e), 52 Stat. 821, as amended, 15 U.S.C. 717–717w) are set out in Appendix A, *infra*, pp. 61–65.

QUESTIONS PRESENTED

1. In determining the initial price at which it will certificate a producer's sale of natural gas under Section 7 of the Natural Gas Act, must the Commission receive and consider evidence (voluminous economic and financial evidence, including individual-company, areawide, and nationwide studies and data concerning cost of service, cash flow, supply and demand, profit and market price trends, cost-revenue trends, comparative well costs, etc.) other than that relating to the determination of a price at which the gas can enter the interstate market without disrupting the level of prices in that market?

2. May the Commission condition the grant of a permanent certificate to sell gas in interstate commerce upon the applicant's refraining from filing any rate increases above a specified level, fixed to avoid triggering escalations of other prices, during the pendency of the area rate proceeding, but not after July 1, 1967?

3. May the Commission, in granting a permanent certificate to sell gas in interstate commerce at an in-line initial price, require that the applicant refund all charges in excess of that price that were previously collected under an earlier unconditioned certificate which had been invalidated on court review?

STATEMENT

In a series of orders issued in 1959, the Commission granted unconditioned certificates of public convenience and necessity authorizing sales by 42 producers of gas in South Louisiana. The contracts,

executed in 1957 and 1958, called for initial prices ranging from 21.4 cents to 23.8 cents per Mcf.[2] The producers accepted the certificates and, within a short time, commenced deliveries.

Consumer representatives, who had opposed the certificate applications before the Commission on the ground that the proposed contract prices were excessive, sought judicial review of the orders in five courts of appeals. The Third Circuit sustained the Commission's action,[3] but this Court summarily vacated the judgment[4] and ordered the case remanded to the Commission for reconsideration in the light of *Atlantic Refining Co.* v. *Public Service Commission of New York* (*CATCO*), 360 U.S. 378. The other four courts of appeals thereupon reversed similar Commission orders and remanded the proceedings to the Commission.[5]

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[2] *Texas Gas Transmission Corp.* (*Hope Natural Gas Co.*), Opinion No. 327, 22 FPC 378, 386–389, rehearing denied, 22 FPC 657; *The California Co.* (*United Gas Pipe Line Co.*), 22 FPC 252, rehearing denied, 22 FPC 653; *The Superior Oil Co.* (*Transco*), 22 FPC 369, rehearing denied, 22 FPC 655; *Sun Oil Co.* (*United Gas Pipe Line Co.*), 22 FPC 351, rehearing denied, 22 FPC 654; and *Sunray Mid-Continent Oil Co.* (*Transco*), 22 FPC 361, rehearing denied, 22 FPC 652.

[3] *United Gas Improvement Co.* v. *Federal Power Commission*, 269 F. 2d 865.

[4] *Public Service Commission of New York* v. *Federal Power Commission*, 361 U.S. 195.

[5] *United Gas Improvement Co.* v. *Federal Power Commission*, 283 F. 2d 817 (C.A. 9), certiorari denied *sub nom. Superior Oil Co.* v. *United Gas Improvement Co.* and *California Co.* v. *United Gas Improvement Co.*, 365 U.S. 879 and 881; *Public Service Commission of New York* v. *Federal Power Commission*, 287 F. 2d 146 (C.A.D.C.), certiorari denied *sub nom. Hope Natural Gas Co.* v. *Public Service Commission of New York* and *Shell Oil Co.* v. *Public Service Commission of New York*, 365 U.S. 880 and 882; *United Gas Improvement*

The Commission subsequently instituted an area rate proceeding for Southern Louisiana and consolidated the remanded cases with that proceeding (Docket No. AR61-2, 29 FPC 223, 26 Fed. Reg. 4296, R. 376; see footnote 7 to the opinion below, R. 622). While denying a motion of the consumer intervenors that would have required the producers to post security, the Commission issued an order advising the producers of their potential obligation to refund any amounts collected in excess of those ultimately found to be proper under Section 7 of the Natural Gas Act (R. 395).[7] When it became apparent that decision in the area rate proceeding would necessarily be delayed, the Commission severed this group of applications and set them for hearing in a consolidated proceeding under Section 7 (R. 410).[8] At the hearing the examiner

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Co. v. *Federal Power Commission*, 287 F. 2d 159 (C.A. 10); *United Gas Improvement Co.* v. *Federal Power Commission*, 290 F. 2d 133 (C.A. 5), certiorari denied *sub nom. Sun Oil Co.* v. *United Gas Improvement Co.*, 368 U.S. 823; and *United Gas Improvement Co.* v. *Federal Power Commission*, 290 F. 2d 147, affirmed *sub nom. Superior Oil Co.* v. *United Gas Improvement Co.*, 366 U.S. 965. (The cases are fully identified in footnote 6 to the opinion below, R. 621–622.)

[7] The Courts of Appeals for the Third and Fifth Circuits dismissed as premature petitions to review that advisory order (*Shell Oil Co.* v. *Federal Power Commission*, C.A. 3 No. 14031 (Oct. 2, 1962); *Callery Properties, Inc., et al.* v. *Federal Power Commission*, C.A. 5 Nos. 19563, 19622, 19653, 19663 (Sept. 20, 1963)).

[8] By the time the hearings commenced, many of the cases had been settled, and only 21 of the original 74 dockets remained outstanding. In the course of the hearings, eight additional dockets were settled, leaving only 13, involving nine producers, for decision. One producer accepted the Commission's order and withdrew its petition for review in the court below. *Kilroy Properties, Inc.* v. *Federal Power Commission*, C.A. 5 No. 21029 (March 31, 1963).

ruled that the proper standard for determining initial prices that would serve the public convenience and necessity was the general level of prices under contracts roughly contemporaneous with petitioners' and free of the infirmities which had led the courts to disapprove the original grants of unconditioned certificates. Adopting this standard, he excluded as irrelevant voluminous cost evidence and other economic data tendered by petitioners which, in his view, would have converted the proceeding into "some 16 different individual producer cost-type cases" (R. 491, 496).

The examiner concluded that the "in-line" price for sales in South Louisiana under 1957 and 1958 contracts was 18.5 cents per Mcf (plus 1.5 cents reimbursement for the Louisiana gas severance tax where applicable) and ordered refunds of all amounts previously collected in excess of that price (R. 499-509, 515-527).[1]

The Commission affirmed the examiner (R. 549). Moreover, in order to forestall the filing of rate increases that might trigger "favored-nation" clauses in, or occasion price redetermination under, a great many other contracts, the Commission added a condition that imposed a moratorium on all increases to

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[1] He also decided that the take-or-pay provisions of the sales contracts should be left as they were until completion of a pending rule-making proceeding on the subject (Docket No. R-199, 26 Fed. Reg. 4615, May 26, 1961), at which time petitioners' contracts should be modified to conform to the decision therein, subject to a floor of 80% of the annual minimum quantities called for by the contracts. The court below held this condition not presently reviewable (R. 641-642) and it is not here in issue.

any price above 23.55 cents per Mcf (including tax reimbursement) until July 1, 1967, or the final decision in the area rate proceeding, whichever is earlier (R. 574-579).

The court below held that the Commission erred in conditioning the certificates to an "in-line" price and in refusing to consider the economic evidence proffered by the producers. It further held that, in conditioning the issuance of a certificate, the Commission could impose no moratorium upon a producer's filing of rate increases. Finally, although it sustained the Commission's authority to order refunds, the court ruled that such refunds are to be measured not by the in-line price, but by a "just and reasonable" rate later to be determined in proceedings under Section 4 or 5 of the Act.

SUMMARY OF ARGUMENT

This case presents for the Court's consideration the regulatory program adopted by the Federal Power Commission in response to this Court's admonition in the *CATCO* case (*Atlantic Refining Co.* v. *Public Service Commission*, 360 U.S. 378) that it exercise its conditioning authority under Section 7 of the Natural Gas Act to afford adequate rate protection to the public during the extensive period required to determine just and reasonable prices. The Commission has carried out this assigned task by (1) prescribing that gas may enter the interstate market only at initial prices "in line" with the established prices at which a substantial volume of gas now flowing in the same area was certificated under contem-

poraneous contracts, and (2) proscribing any increased rate filings, for a limited period of time, above the level which the Commission found was the highest which would not trigger widespread escalations under other sales contracts. Through these two types of conditions the Commission has been able to maintain relative price stability while imposing minimal restrictions upon new rate filings.

The court below invalidated both aspects of this protective program. It held that the Commission could not fix initial prices at in-line levels without considering voluminous evidence as to individual producer, area-wide and nation-wide costs, supply and demand, industry trends and prognostications and similar matters—a requirement which would inevitably complicate the process of certification to a point that would render fruitless any effort to fix starting prices prior to the completion of plenary rate proceedings. And the court concluded that the Commission was without any power to condition a permanent certificate upon even a temporary and partial moratorium on the filing of contractually authorized rate increases, regardless of their level or the consequences of their collection. Moreover, while the court agreed that the Commission could require refunds by producers who had been allowed to charge prices above the proper initial rate level pursuant to certificates set aside on timely appeal, it declared that such refunds should be measured not against the proper initial price determined in the certificate proceeding but against the just and reasonable rate level to be subsequently determined.

1. Under the Commission's decision, producers are free to file contractually authorized increases (subject to the 23.55¢ "anti-triggering" ceiling) and to collect such higher rates (subject to refund) after the six months' notice and suspension period provided by Section 4 of the Act. The Commission, for its part, has determined that the public convenience and necessity require the producers to take the risk that any such increases above the in-line level will subsequently be held to be unjustified, and, if so, to make refunds with interest. *CATCO* made clear that the agency is not required to convert Section 7 certification proceedings into full dress rate cases. The administrative decision thus heeds the teaching of *CATCO* in holding the line pending the determination of just and reasonable rates and in preventing certificate proceedings from becoming bogged down by the consideration of evidence even more voluminous than would be relevant in rate proceedings. By its approach, the Commission provides consumers interim protection and makes its personnel and facilities available for reaching a long range solution through determination of just and reasonable rates, while imposing minimal and temporary restrictions on the producers' freedom to file rate changes.

The in-line price determination involved in this proceeding—18.5¢ per Mcf, plus 1.5¢ for tax reimbursement where appropriate—was clearly justified by the record. None of the sales certificated during the relevant period at any higher price were shown to be free of the defects condemned in *CATCO* and such higher prices were properly discounted by the Com-

mission as suspect pursuant to the uniform directives of the courts which had remanded these cases.

2. This Court's decisions in *CATCO, Federal Power Commission* v. *Hunt,* 376 U.S. 515, and *Federal Power Commission* v. *Texaco Inc.,* 377 U.S. 33, establish that the Commission, acting under Section 7 of the Act, had authority to condition the certificates which it tendered upon the producers' foregoing increases which would otherwise be authorized by their contracts. Nothing in *Hunt* limits this authority to temporary authorizations, and the *CATCO* and *Texaco* cases, both of which involved permanent certificates, argue against any such limitation. Moreover, in view of the danger, recognized by this Court in both *CATCO* and *Hunt,* that the mere charging of rates which could cause widespread triggering could permanently disrupt the rate structure and the admitted inadequacy of the refund remedy for consumer protection (see *Federal Power Commission* v. *Tennessee Gas Transmission Co.,* 371 U.S. 145), the Commission properly determined that charging any price above the 23.55¢ should not be permitted for the prescribed interim period.

3. The lower court properly rejected the contention that ordering the producers to make refunds to their customers of the excessive sums collected under their original certificates (certificates invalidated on review) constituted the award of reparations. The refund order restored the situation as closely as possible to what would have prevailed without the Commission's original error. Moreover, since the producers com-

menced service with full knowledge that the certificate prices were being challenged, they cannot claim a right to rely on them.

The lower court, however, improperly held that the Commission could not fix the measure of refunds at the difference between what the producers had been charging and the proper certificate price. The Commission's order merely placed upon the producers the burden which they assumed when they commenced operations under certificates still subject to challenge.

ARGUMENT

INTRODUCTION

In *CATCO*,* this Court, stressing the underlying purpose of the Natural Gas Act "to afford consumers a complete, permanent and effective bond of protection from excessive rates and charges" (360 U.S. at 388), held that the Commission could not simply permit gas to be sold in the interstate market at the producer's contract price pending determination of just and reasonable rates under Section 5 of the Act where the collection of the proposed contract price during the protracted waiting period would adversely affect the public interest. "Where the application [for a certificate of public convenience and necessity to sell gas to an interstate pipeline] on its face or on presentation of evidence signals the existence of a situation that probably would not be in the public interest," an unconditioned grant of the certificate application ought not be made (*id.* at 391). The Court indicated,

* *Atlantic Refining Co.* v. *Public Service Commission*, 360 U.S. 378.

however, that in such circumstances the Commission's power to attach conditions under Section 7(e) of the Act provides an alternative to denial of a certificate (*ibid.*):

> * * * Where the proposed price is not in keeping with the public interest because it is out of line or because its approval might result in a triggering of general price rises or an increase in the applicant's existing rates by reason of "favored nation" clauses or otherwise, the Commission in the exercise of its discretion might attach such conditions as it believes necessary.

In keeping with this mandate, the Commission imposed two conditions on the certificates granted in the present cases: (1) that the producers commence service at the 18.5 cents* (per Mcf) price that the Commission found to be "in line" with prices for Commission-certificated sales of gas from the Southern Louisiana production area under generally contemporaneous contracts; and (2) that, until just and reasonable area rates are determined for Southern Louisiana, or until July 1, 1967, whichever is earlier, the producers shall not file any increased rates above 23.55 cents, the level at which rate filings could trigger increased rates by other producers under the escalation provisions of their contracts with the three pipeline customers here involved.

The court below held both of these conditions invalid. It ruled that the Commission could not limit the producers to an initial in-line price—at least not

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* Plus 1.5 cents per Mcf for partial reimbursement of State taxes where applicable.

without first considering a mass of information which would have encompassed as much material as would be required to determine the just and reasonable price for the gas. It also concluded that the Commission had no power to place any upper limit on the rates for which a producer might file in a prescribed future period."

The court below did uphold the Commission's power to order the producers to make refunds for the preceding period, during which they had been operating under the terms of certificates invalidated on previous appeals. But that ruling was qualified by the court's holding that the measure of these refunds was not to be the difference between the in-line price and the contract prices originally certificated (as the Commission had determined) but was to be based upon the just and reasonable price to be subsequently fixed.

The court has thus converted a procedure calculated to provide essential interim protection to consumer and producer alike into one that could not be completed in advance of full-blown rate proceedings. The result, we urge, falls short of the degree of consumer protection deemed necessary by the Commission and is not consonant with the Act or the decisions of this Court.

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[*] As the Court is aware, the Commission's power to suspend a filed rate is limited to a period of five months beyond the initial 30-day notice period. Section 4(e).

I. FIXING THE INITIAL PRICE FOR SALES OF NATURAL GAS TO PIPELINES AT THE "IN-LINE" PRICE LEVEL ACCORDS WITH *CATCO* AND THE RECORD FULLY SUPPORTS THE COMMISSION'S DETERMINATION OF THAT LEVEL

A. INITIAL PRICE WAS PROPERLY TREATED BY THE COMMISSION AS THE ONLY CONTROVERSIAL QUESTION REMAINING FOR ITS DETERMINATION

From the beginning of these cases there was no question that this gas was needed in the interstate market, that the reserves were adequate to warrant institution of the service, and that the producer applicants were able and willing to perform the services. The only point in issue at any time, before the Commission or in the courts, was whether it would be consistent with the public interest to permit the gas to enter the market under the price provisions of the contracts.

The burden of *CATCO* was that the Commission, in that case, had not given sufficient consideration to price in appraising the public convenience and necessity. Although the Commission had originally concluded that the *CATCO* "sale should not be permanently certificated unless the rate level has been shown to be in the public interest" (*Continental Oil Co.*, 17 FPC 563, 575), it finally issued the certificates at the contract price which it had previously found too high. It did so because it thought the public interest in having the gas brought into the interstate market outweighed the possibility, if not the probability, that the gas would be sold at an unreasonably high price during the period before a Section 5(a) rate case could be completed. This Court

held that the Commission erred in giving the other elements of the public interest controlling weight so as to undermine "[t]he overriding intent of the Congress to give full protective coverage to the consumer as to price" (*CATCO*, 360 U.S. at 389).

Neither the fact that new supplies of gas are constantly needed in the interstate market to replace the gas being drawn from the ground and to provide essential reserves for the new consumers always being added, nor the fact that the pipelines and consumers may be willing—or economically compelled—to pay the prices demanded therefor by the producers, is sufficient to establish that the public interest would be served by a sale at the producer-proposed price. It is the Commission's function to "hold the line" pending ultimate determination of just and reasonable prices. For the agency to certificate sales at ever higher prices simply because the producers insisted on them, the Court indicated in *CATCO*, would frustrate the scheme of regulation. Thus, when the Commission, following the admonition in *CATCO*, conditioned the present certificates to an initial "public interest" price, it did not, as the court below held, make price the sole consideration; it simply held that, although it had been shown that there was a need for the gas involved and that the producers were able and willing to meet that need, the public interest would not be served if the gas were to enter the market at contract prices in excess of the in-line price for other new gas entering the interstate market in the particular pricing area at the same time. Price was the issue on which all these cases had been remanded

to the Commission and the sole issue remaining in controversy. *Cf. Atlantic Refining Co.* v. *Federal Power Commission*, 316 F. 2d 677, 680 (C.A.D.C.).

B. THE COMMISSION PROPERLY FOUND THAT THE PUBLIC INTEREST REQUIRED THE INITIAL PRICE TO BE SET AT THE IN-LINE LEVEL, WITHOUT CONSIDERATION OF EVIDENCE PURPORTING TO JUSTIFY AN OUT-OF-LINE PRICE

As indicated immediately above, the Commission held that the public interest would not be served by a grant of these certificates if the initial price to be charged by the producers was fixed at a price out of line with that charged for other new gas coming into the market during the same period in Southern Louisiana. The court below held that, before reaching this conclusion, the Commission was required to consider masses of evidence it had excluded as irrelevant. It did not rule that this evidence was in fact relevant in fixing the in-line price. Rather, it held that the Commission could not set the initial certificate price at any in-line level below a producer's contract rate unless the producer was first given the right to introduce evidence purporting to demonstrate that a higher price was demanded by the public interest.

In response, we undertake to show that the Commission's program and method of controlling initial price are reasonable and necessary; that the cases do not support the conclusion that expanded proceedings of the kind contemplated by the court below are required; and that the imposition of the Fifth Circuit's new rule would hopelessly clog the administration of the Act.

1. The Commission has determined that the public interest will not be adequately protected by authorizing producers to commence sales at their contract prices, subject to later refund should the just and reasonable price be found to be lower. As this Court recognized in *CATCO* (380 U.S. at 390) and reemphasized in *Federal Power Commission* v. *Hunt*, 376 U.S. 515, 524, the mere charging of an out-of-line price, even though it is subject to refund, can have permanent and adverse effects upon the general price level. In addition, as this Court observed in *Federal Power Commission* v. *Tennessee Gas Transmission Co.*, 371 U.S. 145, and reiterated in *Hunt* (pp. 524–525), the refund procedure, in any event, is by no means adequate in providing full protection to the consumer who pays the high rate.

To cure these defects the Commission here prescribed a two part remedy. At the upper end of the price spectrum, it placed a temporary moratorium on any increased rate filings at or above the probable triggering level. The validity of this action is discussed in Part II of this brief, *infra*. In addition, it concluded that the initial price at which gas would be certificated to enter the market would be the in-line level, *i.e.*, the highest price at which substantial amounts of gas had been certificated to enter the market under other contemporaneous certificates not themselves subject to court review or otherwise suspect.

The latter step has importance for producers as well as consumers. The initial certificate price constitutes a firm price at which producers can continue

to operate pending the determination of just and reasonable rates without any contingent obligation to make refunds should the just and reasonable price later turn out to be at a lower level. For very sound economic reasons, many producers wish to commence service at a firm price rather than run the risk of the indefinite and potentially large refund obligations which could result if they were certificated at contract rates subject to a refund condition should these rates ultimately prove unjustified. If they know the price is free and clear, they can release funds for operational purposes, make necessary payments to royalty owners (who often are entitled to a percentage of the sales price) and meet their obligations under State taxing statutes (which in many areas are calculated at a percentage of producer revenues).

The Commission's policy adopted here permits the producers, upon acceptance of their certificates at the in-line price, to file immediately for any contractually authorized prices within the limits of the triggering moratorium. If they do so, they may place the higher rates into effect after the statutory thirty-day notice period and the expiration of the five months' maximum suspension period (see Natural Gas Act, Section 4(e)). This does not mean, however, that setting the price at the in-line level is without effect in achieving the *CATCO* objective. In the first place, the statutory power to delay rate increases above the in-line level for six months is of more than negligible significance. Equally important, experience has shown that, once the firm initial price has been set at the

level provided by the in-line standard, many producers—those who would not want to run the risk of later being obligated to make substantial refunds (plus interest)—will continue to operate at this figure. In fact, the vast majority of producers whose initial rates have been set at in-line price levels have voluntarily chosen to continue operating at that level despite contractual and certificate authority to file for higher figures."

This, of course, has the effect not only of keeping the general price level relatively constant, pending the

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"Thus in the nine in-line determinations made prior to the present opinion, of a total of 87 sales whose initial price was set below contract levels, only 13 have subsequently filed for higher rates, either to the original contract level or to take advantage of periodic escalations subsequently coming due. The nine proceedings are *El Paso Natural Gas Co., et al.*, Opinion No. 335, 23 FPC 369, affirmed *sub nom. Texaco, Inc.* v. *Federal Power Commission*, 290 F. 2d 149 (C.A.5) (Aneth Field); *Continental Oil Co., et al.*, Opinion No. 351, 27 FPC 96 (*CATCO* on remand); *Michigan Wisconsin Pipe Line Co., et al.*, Opinion No. 353, 27 FPC 449 (Oklahoma); *Ohio Oil Co., et al.* (no opinion), 27 FPC 551, affirmed *sub nom. Atlantic Refining Co.* v. *Federal Power Commission*, 316 F. 2d 677 (C.A.D.C.), *supra* (North Louisiana); *El Paso Natural Gas Co., et al.*, Opinion 358, 27 FPC 1134 (Wyoming); *Standard Oil Co. of California, et al.*, Opinion No. 359, 27 FPC 1153, affirmed *sub nom. California Oil Co.* v. *Federal Power Commission*, 315 F. 2d 652 (C.A.10) (Utah); *Skelly Oil Co., et al.*, Opinion No. 362, 28 FPC 401, affirmed *sub nom. Public Service Commission of New York* v. *Federal Power Commission*, 329 F. 2d 242 (C.A.D.C.), certiorari denied, *sub nom. Prado Oil & Gas Co. and Skelly Oil Co., et al.*, v. *F.P.C.*, 377 U.S. 963 (Texas RR District 4); *Texaco Seaboard Inc., et al.*, Opinion No. 383, 29 FPC 593 (Texas RR Districts 3 and 4); *El Paso Natural Gas Co., et al.*, Opinion No. 390, 29 FPC 1175 (Oklahoma Panhandle).

area rate determination,[12] but also of avoiding, in large part, the inadequacies of the refund procedure. See *Federal Power Commission* v. *Tennessee Gas Transmission Co.*, 371 U.S. 145. It has also had the incidental, but important, effect of helping to reduce the Commission's backlog of pending certificate applications to a new six-year low of 1,401 as of June 30, 1964, down almost 1,000 from the 2,390 pending on June 30, 1959, at the time of the *CATCO* decision. Compare Thirty-Ninth Annual Report, Federal Power Commission, 1959, p. 76, with Forty-Fourth Annual Report, Federal Power Commission, 1964, p. 146.[13]

What respondents are seeking, in attempting to introduce evidence to show that the initial prices should be fixed at higher than in-line levels, is not the right to file for and charge higher prices but the privilege of doing so without the risk of being subject to refund obligations. Even if the administrative problems inherent in any attempt to go beyond data as to comparable contemporaneous sales were not of extraordinary magnitude, the Commission could properly determine under Section 7 of the Act that adequate protection to the public interest requires that gas not enter the interstate market at prices higher than exist-

[12] We have set out an Appendix B, *infra*, p. 66, a chart showing how the field prices of natural gas have leveled off during the period in which initial prices have been consistently fixed at the in-line price.

[13] Commission figures for the fiscal year ending June 30, 1965, not yet published, indicate an even greater reduction in the backlog bringing the number of pending producer certificate applications on hand as of this later date down to 1,094.

ing levels. In fact, however, any requirement that the Commission consider evidence of the type and mass involved here, would, in practical effect, render nugatory any effort to fix initial prices prior to the just and reasonable rate determinations."[14]

We emphasize that what is in issue here is the establishment of a viable interim system which will protect the public against a run-away gas price structure while the basic just and reasonable prices are being fixed through the area rate proceedings now in various stages before the Commission.[15] When such just and reasonable prices have been determined, the initial

[14] It may be questioned whether even respondents would be so eager to extend the present proceeding to consider the voluminous excluded evidence were they not presently operating at the high prices originally set in the voided certificates. It is certain that most producers (as well as the piplines and their customers) could not await such a prolonged proceeding before commencing service. And while under such circumstances service might commence under temporary authorizations set at "guideline" prices fixed *ex parte* by the Commission, both producers and consumers are entitled to a prompt hearing to show that such prices are below or above the proper in-line level.

[15] The Commission's decision in the Permian Basin area rate proceeding (AR61–1), involving approximately 11% of the gas coming into interstate commerce, was issued on August 5, 1965. The Southern Louisiana case (AR61–2) is well along towards completion of the hearing stage of the proceeding, and direct evidence has already been submitted in two other proceedings involving the Hugoton-Anadarko basins of Kansas, Oklahoma, and Texas (AR64–1) and the Texas Gulf Coast areas (AR64–2) in which formal hearings are scheduled to start on September 14, 1965. These four proceedings cover 11 of the 23 pricing areas established by the Commission in its 1960 Statement of Policy (25 Fed. Reg. 18969, 18 C.F.R. 2.56) and approximately 80% of all gas flowing in interstate commerce.

price problem in gas certification proceedings will be far less critical. The area rates will obviously provide a standard of reference by which to appraise the prices at which new gas should be introduced into the market. For the present, however, it would be a grave loss if the Commission were required to divert its available manpower and resources to consider evidence purporting to show that some producers should be permitted to enter the interstate market at prices higher than the in-line level at which substantial amounts of gas are in fact entering that market. Compare *Wisconsin* v. *Federal Power Commission*, 373 U.S. 294, 313–314.

2. In support of its holding that everything proffered in the way of evidence to justify an initial price above the in-line level must be admitted and considered, the court below relies primarily upon this Court's opinion in *CATCO*—in particular, the language noting that the producers there had not introduced evidence to show the "relative costs of production" in the off-shore production area involved and another off-shore area where the going prices were lower, nor any "reason why" the proposed price was some 70% higher than the pipeline's weighted average cost of gas (360 U.S. 392–393). The fact, however, is that *CATCO* merely held that there was an insufficient evidentiary basis for certificating the *CATCO* producers at a firm price 4.4 cents above that which the Commission had earlier found was the highest justified by the public interest (see *CATCO*, 360 U.S. at 386); the Court did not indicate that the

Commission must permit evidence before it can set the initial price at prevailing levels."[16]

The discussion in *CATCO*, it should be further noted, was made in the context of fixing the initial price for a new production area from which no previous sales had been made. As the Ninth Circuit suggested in *United Gas Improvement Co.* v. *Federal Power Commission, supra,* n. 4, p. 4, 283 F. 2d 817, 823, "Where there are no producer prices which are otherwise comparable and resort must be had to other criteria, * * * relative production costs, need, competition between pipeline companies, and no doubt other factors become significant." The portion of the *CATCO* opinion directly following the language relied upon by the lower court (R. 627) makes clear that even in such situations the most compelling evidence is that showing the relationship of the proposed price to other prices being paid by the pipeline in adjacent areas. See 360 U.S. at 393.

3. Although it verbally acknowledges this Court's admonition that Section 7 proceedings should not be extended, full-dress rate hearings, the court below proceeds to hold that in the present cases the Commission was required to receive and evaluate not only all the cost-of-service evidence which would have sufficed in individual rate proceedings for each of the 16 producers (but which might not be appropriate

[16] This is equally true with respect to the dicta in the various court of appeals cases cited by the lower court, all of which similarly appeared in decisions rejecting Commission certificates issued at prices greatly in excess of the in-line price.

in the pending area rate cases), but also a great mass of additional evidence of a general nature—evidence of the type which might be relevant to proceedings instituted to fix just and reasonable area rates.[17] The implications of the holding below can best be seen by the court's own summary of the proffered evidence which it held the Commission was required to admit and evaluate (R. 623-624):

> * * * At the outset of the hearing, the producers sought to introduce what the Examiner described as "a tremendous mass of cost-type, economic and financial evidence." This cost-of-service evidence followed generally the pattern used by the Commission in prior determinations. Broadly speaking it demonstrated that on a cost-of-service basis the cost to the producers was considerably in excess of the contract price sought to be certificated in the pending applications. Other evidence bore upon the minimum financial requirements for finding and producing gas. These also used techniques and methods employed by the Commission in determining analogous minimum financial requirements. Other evidence showed the demand and supply situation existing both nationwide and in South Louisiana. Some was detailed, indicating that the demand for gas

[17] *Cf. ODECO's* argument in its brief in opposition to certiorari (p. 11) to the effect that the mass of individual cost data here tendered should have been admitted because "if not received in certificate proceedings, evidence relating to individual circumstances will never be heard in any proceeding before the Commission." Whether this is so or not, it would be strange indeed to hold that cost data must be considered in a certificate proceeding *because* they were not necessary in a rate proceeding.

is increasing far in excess of the annual additions of gas supply. Other evidence tied this directly into the exploration for, and finding of, new gas supplies to meet the increased demands, the relation of field prices to those efforts, the impact of lowered prices on exploratory activity, and the like. Other evidence showed the nationwide increase in the current cost of new gas supply over the pre-Catco prices, the increase in the weighted average contract price in this period in relation to drilling and exploratory costs, and refutation of the assertion that contract prices in South Louisiana have leaped from plateau to plateau. We need not describe it in any greater detail since in affirming the Examiner's rejection of the evidence, the Commission characterized it as "economic and financial evidence" including that relating to "an individual company or on an area-wide basis" without regard to whether it was "the type characterized as cost-of-service studies, cash flow studies, demand-supply, cost, profit and market price trends, area cost-revenue trends, comparative well cost data and gas replacement costs * * *."

The offer of proof alone, without cross examination or rebuttal evidence, covered some 2,000 pages in the record.

At another point (R. 629) the court appears to suggest a virtually unlimited number of additional subsidiary or tangential factual questions, such as population growth and industrial expansion in various areas, which might properly be explored in determining the initial prices at which producers' sales

may be certificated. These questions apparently are expected to set off a chain reaction of additional subsidiary questions."

The decision to exclude evidence of the kind proffered here was not arrived at suddenly. It grew out of repeated consideration of the problem in case after case arising since *CATCO*. In the earlier cases such evidence was admitted. But accumulating experience led to a recognition that it was not material to the purpose at hand. The turning point came in *Skelly Oil Co., supra,* at 28 FPC 406–413, affirmed *sub nom. Public Service Commission of New York* v. *Federal Power Commission, supra,* 329 F. 2d 242, certiorari denied *sub nom. Prado Oil & Gas Co.* v. *Federal Power Commission,* 377 U.S. 963. There, holding that the initial price should be determined by the in-line

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[18] That the opinion below necessarily entails a mammoth proceeding is emphasized by its "distinction" of the District of Columbia Circuit's decision in the *Skelly* case (*Public Service Commission of New York* v. *Federal Power Commission, supra,* 329 F. 2d 242, certiorari denied *sub nom. Prado Oil and Gas Co.* and *Skelly Oil Co.* v. *Federal Power Commission,* 377 U.S. 963), which had sustained the Commission's ruling that cost and other economic data tendered by producer applicants were irrelevant to a determination of a proper initial price condition in a certificate. *Skelly Oil Co.,* 28 FPC 401, 411, modified, 28 FPC 1065. The court's comment is that (R. 632, n. 32) "The evidence relating to cash outflow and replacement cost proffered and rejected in [*Skelly*] was much more limited than that here." Thus, while stating that "there need not be a full dress § 4 or § 5 rate hearing" (R. 632) and expressing confidence that "with resourceful ingenuity the Commission can develop procedural devices which will keep these § 7 hearings from being bogged down into the full dress § 4 or § 5 rate hearing" (R. 631–632), the court has ruled in effect that the more voluminous the evidence tendered, the stronger the Commission's obligation to receive, consider and evaluate it.

price in the area at the time the contract in issue was executed, the Commission discussed the evidence as to the in-line price, described the other economic and financial evidence that had been introduced and the arguments based thereon, and then stated its reasons for concluding that such evidence was not necessary or appropriate, was of limited utility, and would lead to complicated, long-drawn-out proceedings.

In affirming, the Court of Appeals, speaking through Judge Fahy, stated (329 F. 2d at 246–247):

> * * * [T]hese are not rate cases of the type in which evidence of this kind ordinarily is considered relevant. These proceedings under Section 7, considered with the *Catco* decision, permit the Commission to fix the "in-line" price, not on a basis of cash outlay or replacement costs, but on the basis of the price level established by comparable sales contracted for by those placing gas in the area in interstate commerce. The standards of Sections 4 and 5 are not those to be used in conditioning a certificate issued under Section 7; otherwise the purpose of *Catco* to avoid the consequences of the well nigh interminable proceedings incident to a rate case would be defeated. See, for example, *United Gas Improvement Co.* v. *FPC, supra,* 283 F. 2d at 823. Consideration of the proffered evidence was not essential. * * *[10]

A similar view was expressed by the Tenth Circuit in *California Oil Co., Western Division* v. *Federal Power Commission,* 315 F. 2d 652, 659. It stated that,

[10] See, also, the same court's prior opinion in *Atlantic Refining Co.* v. *Federal Power Commission, supra,* 316 F. 2d at 680.

even in dealing with a new marketing area where comparable prices were not available, it was doubtful that

> * * * costs * * * are relevant at all in determining the "in line" price in a Section 7 proceeding. * * *

It observed further (315 F. 2d at 660):

> We do not think that the Commission was required in this case to consider the exploration and drilling costs or the cost of delivery services in arriving at the "in line" price in a certification proceeding. The consideration of these matters may properly be left to a Section 4 proceeding.

We submit that the Commission acted well within its powers in undertaking to fix the "in-line" initial price on the basis of the price level established by comparable sales in the area.

C. THE SPECIFIC IN-LINE PRICES ON WHICH THE COMMISSION CONDITIONED THE CERTIFICATES WERE FULLY SUPPORTED

Because the court below rejected the Commission's "in-line" standard for determining initial producer rates as a matter of law, it did not reach respondent's further contention that the specific initial price prescribed, 18.5 cents per Mcf (plus 1.5 cents per Mcf tax reimbursement where applicable), was unsupported by the record. Nonetheless, we believe that the circumstances of the present case warrant this Court's resolution of this issue at the present time, without remand to the court below for initial consideration. Compare *United Gas Improvement Co.* v. *Continental Oil Co.*, 381 U.S. 392, 404–405; *Federal Power*

Commission v. *Southern California Edison Co.*, 376 U.S. 205; and *United Gas Pipe Line Co.* v. *Memphis Light, Gas & Water Division*, 358 U.S. 103, 114.

The present cases have been pending since 1957 and 1958, when the applications for certificates were filed (R. 537–540, 552–553). During that time they have gone through the Commission and the courts twice. They involve issues at the core of the Commission's entire program for interim regulation of natural gas producers. Since the Commission has applied, and is continuing to apply, the principles here under attack in numerous other cases, it is highly desirable that a definitive ruling be secured at the earliest possible time. In addition, the Commission's orders have been stayed pending completion of judicial review (R. 616). Accordingly, the delay inherent in a remand to the court of appeals, with probable petitions for certiorari to review the decision on remand, will further postpone any relief to which consumers are held entitled. Finally, the question presented is purely one of law since the relevant evidence is uncontradicted.

I. *The 18.5 cents per Mcf base price is supported by the record*

As previously stated, the standard adopted for the initial certificate price is the general level of prices in the area of sale at the time the applicants' contracts were made. In *CATCO*, on remand, the Commission ruled that, in determining the prevailing price level in Southern Louisiana, no weight should be given to the contract prices originally certificated in *CATCO*. Similarly, the Commission ruled out all

other prices certificated during the original *CATCO* period at prices equal to or higher than the unsupported *CATCO* level. *Continental Oil Co.*, 27 FPC 96 and 592.[20] On the basis of the remaining "non-suspect" contract prices under which gas had started flowing from the Southern Louisiana area, the Commission concluded that the proper in-line prices for the *CATCO* sales were 18.5 cents per Mcf (for off-shore gas), with an additional 1.5 cents per Mcf for reimbursement of State taxes where applicable.

In the present cases, the examiner, rejecting a suggestion that the Commission's *CATCO* decision on remand be taken as conclusive of the proper initial price for sales instituted a year or so later (R. 494), received and independently evaluated (R. 502–507) the evidence of prevailing price submitted by some of the applicants (R. 506–507). Following the principles enunciated by the Commission in *CATCO* on remand, the examiner eliminated the original *CATCO* contracts and other contracts at prices equal to or higher than the *CATCO* level. These "suspect" contracts aside, the applicants' price evidence (Ex. 42, Sch. 3 and 4, R. 292–293) showed, as summarized by the examiner and the Commission (R. 558):

> * * * that there were 47 contracts executed in 1957 with volumes of 56,500 Mmcf and 59 contracts executed in 1958 with volumes of 70,500 Mmcf at initial prices of 18.5 cents or less. Also, out of a total of 1958 deliveries of

[20] The subsequent settlement (28 FPC 1090), which did not affect the 18.5 cents rate fixed, resulted in withdrawal of the petitions that had been filed for review of the Commission's order.

> 241,200 Mmcf from Southern Louisiana under contracts made prior to the initial erroneous CATCO order, only 63,900 Mmcf was sold at prices above 18 cents. * * * [Footnote omitted.]

The evidence was uncontradicted, the specific finding undisputed, and the only question is whether the Commission acted improperly in fixing the in-line price at the highest level remaining after eliminating from its consideration the unsupported *CATCO* prices and similar prices obviously influenced by the Commission's earlier erroneous certification of the *CATCO* contracts.

We submit that the Commission's action is supported, if not indeed required, by prior decisions of this Court. A major reason for this Court's condemnation of the Commission's original order in *CATCO* was its prediction (360 U.S. at 390) that if the Commission's certification were to stand "[t]he price certificated [would] in effect become the floor for future contracts in the area." Shortly thereafter, the Third Circuit in effect accepted as irreversible the new high price plateau permitted by the Commission's prior erroneous issuance of unconditioned certificates. *United Gas Improvement Co.* v. *Federal Power Commission*, 269 F. 2d 865, affirming *Transcontinental Gas Pipe Line Corp.*, 20 FPC 264 and 571. But this Court summarily vacated that judgment and ordered the case remanded to the Commission for further consideration in the light of *CATCO*. *Public Service Commission of New York* v. *Federal Power Commission*, 361 U.S. 195. The necessary implication of these decisions is that the

price plateau created by the erroneously certificated *CATCO* contracts could not be taken as indicative of the initial price to be established in the public interest. The Commission must take steps to undo any harm caused by its original erroneous action.

This view of the Commission's duty was explicitly adopted by the courts of appeals in the decisions remanding the instant cases to the Commission. For example, in *United Gas Improvement Co.* v. *Federal Power Commission*, 283 F. 2d 817, 824, certiorari denied *sub nom. Superior Oil Co.* v. *United Gas Improvement Co.*, 365 U.S. 879, and *California Co.* v. *United Gas Improvement Co.*, 365 U.S. 881, the Ninth Circuit held that certificated prices then in litigation should be disregarded, and added (p. 824):

> We go further and express the view that where a substantial number of certificated prices are thus under court or Commission review, like prices in the same area though not currently under review ought to be regarded as suspect. * * *

Shortly thereafter the District of Columbia Circuit expressly approved this view (*Public Service Commission of New York* v. *Federal Power Commission*, 287 F. 2d 146, 149, n. 3), declaring (p. 149) that "Where the inquiry is whether a particular proposed price is inflated, it serves no purpose to refer to other prices which may be equally inflated." See also *Public Service Commission of New York* v. *Federal Power Commission*, 287 F. 2d 143, 145 (C.A.D.C.); *United Gas Improvement Co.* v. *Federal Power Commission*, *supra*, n. 4, p. 5, 287 F. 2d 159 (C.A. 10); *United Gas Improvement Co.* v. *Federal Power Commission*, 290 F. 2d 133 (C.A. 5), certiorari denied *sub nom.*

Sun Oil Co. v. *United Gas Improvement Co.*, 368 U.S. 823; and *id.*, 290 F. 2d 147 (C.A. 5), certiorari denied *sub nom. Superior Oil Co.* v. *United Gas Improvement Co.*, 366 U.S. 965. The Commission should not grant unconditioned certificates simply because the contract prices "had been bargained for at arm's length, or [because] they were not higher than a price someone else was then paying the area" (290 F. 2d at p. 136). As Judge Wright subsequently stated in *Atlantic Refining Co.* v. *Federal Power Commission, supra,* 316 F. 2d at 680, n. 12, these cases teach that, in determining the price line to be held, "sales subject to litigation before the Commission or in court, and all sales similar to such sales, are suspect."

The court below apparently disapproved the Commission's method in the present cases because the 18.5 cents per Mcf price "was actually a 1956 level" (R. 630, n. 23) and the court deemed it "inconceivable that Congress meant to freeze the rates to 1956-58, or to any other particular time for that matter" (R. 630, footnotes omitted).

The court below erred, however, in construing the Commission's action as a rigid freeze of prices. The contracts here involved were all made in 1957 or 1958 and, as indicated *supra,* paramount weight was given to the price structure during those years. That the in-line price for sales in the later period was ultimately determined to be the same as in 1956 is due to the fact that the contracts made at higher prices during 1957 and 1958 were not shown to be free of the improper influence of the original certificates in *CATCO.*

This does not mean that the in-line price line, once fixed, is necessarily inflexible. On the contrary, in the subsequent *Amerada* decision, involving Texas Railroad District 4 (*Amerada Petroleum Corp.*, 31 FPC 623 and 1315, pending upon petitions for review) the Commission found that the in-line price for that production area was 16 cents for the period between September 28, 1960, and August 30, 1962, although it had already concluded that the in-line price for the previous period was only 15 cents (see *Skelly Oil Co., supra,* 28 FPC 401 and 1065). Of course, whether a price line will change, and if so in what direction, will necessarily depend upon the facts relevant to each area. Since the decision here under review, the Commission has concluded that the line in the Southern Louisiana Area here in issue not only did not change between 1956 (the time of the *CATCO* contracts) and 1957–1958 (the time of the present contracts) but remained constant through the end of 1962 (*Union Texas Petroleum Co.*, 32 FPC 254 and 952, pending upon petition for review *sub nom. Pan American Petroleum Corp.* v. *Federal Power Commission*, C.A. 10 No. 7912).

We accordingly submit that the Commission properly exercised its discretion when, in determining the in-line price for the sales here in question, it declined to give weight to certificated prices that had been set aside by the courts, were being litigated, or were not clearly shown to have been uninfluenced by such "suspect" prices.

2. *The 1.5 cents per Mcf allowance for reimbursement of State taxes is supported by the record*

In its remand opinion, the Ninth Circuit expressly held that the Commission was obliged to consider the total price paid for the gas and that it was an abuse of discretion for the Commission to look only to the base price without regard to any added cost for tax reimbursement. *United Gas Improvement Co.* v. *Federal Power Commission, supra,* 283 F. 2d at 825. In Judge Hamley's words "tax reimbursement is an item for bargaining between producer and pipeline company." The evidence in this case corroborates the court's statement, showing tax reimbursement ranging from zero to 100% of the tax (Ex. 42, Sch. 6, R. 296). In settlements reached in several of the remanded Southern Louisiana cases, the producers reserved the right to file for reimbursement of only 50% of any federal severance tax which might later be imposed on off-shore gas. *Texaco Inc.,* 28 FPC 247, 248. The 1.5 cents per Mcf here allowed by the Commission amounts to approximately 65% of the present 2.3 cents per Mcf State tax. It is the amount of tax reimbursement provided in 43 contracts made in 1957 and 1958 (with one contract providing for no tax reimbursement and one calling for 1.3 cents per Mcf) (Ex. 42, Sch. 6, R. 296).

On this evidence, it cannot be said that the Commission's allowance was arbitrary or capricious. So long as a very substantial number of producers were freely contracting at that figure, it was clearly within the zone of reasonableness. There is no requirement that the Commission allow the highest price con-

tracted for or the average price, or adopt any other mathematically precise measure.

II. THE PARTIAL MORATORIUM ON PRICE INCREASES IMPOSED BY THE COMMISSION IS A REASONABLE MEASURE AND WITHIN ITS STATUTORY POWER

As already elaborated, the present cases concern the Commission's responsibility to afford consumers adequate protection against excessive prices while just and reasonable rates are being determined. The Commission met this responsibility in part by fixing at the "in-line" level the initial prices at which gas may enter the interstate market. But the Commission determined (R. 578) that this condition, standing alone, was not sufficient and that it could not adequately "hold the line" if producers were free to file any contractually authorized increases, no matter how high, and put them into effect in six months (the thirty-day notice period plus the maximum period of suspension under Section 4(e)). Explaining (R. 578) that any price in excess of 23.55¢ per Mcf might trigger increases and call for price redeterminations under the applicable contracts of the respondents' pipeline customers,[21] it conditioned the

[21] While present Commission regulations now outlaw most types of indefinite escalation clauses for the future (Order No. 232, 25 FPC 379, 26 Fed. Reg. 1983, as amended by Order No. 232–A, 25 FPC 609, 26 Fed. Reg. 2850; Order No. 242, 27 FPC 339, 27 Fed. Reg. 1356; Regulation, § 154.91, *et seq.*, as amended, 18 C.F.R. (Cum. Supp. 1963) § 154.91, *et seq.*; see *Federal Power Commission* v. *Texaco Inc.*, 377 U.S. 33; *Superior Oil Co.* v. *Federal Power Commission*, 322 F. 2d 601 (CA9) certiorari denied, 377 U.S. 922), much gas is still being sold under long term contracts containing indefinite escalation clauses made and certificated before Orders Nos. 232 and 242 were issued.

grant of the instant certificates so as to preclude any filings of increases above that figure until a final decision in the pending Southern Louisiana Area Rate Proceeding (AR61–2), or until July 1, 1967, whichever is earlier. In adopting this measure, the Commission was dealing with practical necessities of the same kind described by this Court in *Federal Power Commission* v. *Hunt, supra,* at 524:

> [N]or is it any answer to say that the suspension power under § 4(e) will afford protection to the public. The experience since [*CATCO*] indicates that a triggering of price rises often results from the out-of-line initial pricing of certificated gas. These effects become irreversible and splash over into intrastate sales, thus generating reciprocal pressures that directly affect jurisdictional rates. As we said in *Federal Power Comm'n* v. *Tennessee Gas Transmission Co.,* 371 U.S. 145, 154, 155 (1962), the possibility of refund does not afford sufficient protection: * * *

Without questioning the Commission's finding that filing above this ceiling might have the consequences feared, the court below concluded that, "no matter how commendable that policy may be," the Commission was without statutory authority to accomplish it (R. 636). In the court's opinion, the statutory scheme gives a natural gas company an absolute right to file any contractually authorized rate increases and collect them subject to refund after the end of the suspension period.

A. We disagree, and submit that the Commission's power to condition a certificate by a provision that

there be a moratorium upon price changes is sustained by this Court's decisions in *CATCO, Hunt,* and *Federal Power Commission* v. *Texaco, Inc.*, 377 U.S. 33.

Sections 7 (c) and (e) of the Natural Gas Act impose upon the Commission the duty to control the terms and conditions under which natural gas companies may initiate proposed sales at wholesale of natural gas in interstate commerce. The Commission can do this by denying a certificate for a sale which, for any reason (including price), is not required by the public convenience and necessity. Alternatively, it may authorize the sale subject to conditions. In following the latter course, the only limitation stated in the statute is that the Commission shall confine itself to "such reasonable terms and conditions as the public convenience and necessity may require."

In *CATCO,* the Court concluded that where a proposed price might result in triggering of general price rises the Commission should impose appropriate conditions upon the granting of permanent certificates in order to protect the public interest. Although it did not discuss the type of condition imposed in the instant case, there is nothing in the *CATCO* opinion confining the Commission to conditions prescribing initial prices. The essential point is that the Commission's conditioning power should be used to "afford consumers a complete, permanent and effective bond of protection from excessive rates and charges," since the "overriding intent of the Congress [is] to give full protective coverage to the consumer as to price * * *." 360 U.S. at 388–389.

In *Hunt*, the Court upheld a condition which specifically forbade a change of rates. The authorization to the producer was a temporary one and it prohibited the filing of any rate increases during the pendency of the proceeding on the permanent certificate. The court below read the *Hunt* decision as limited in applicability to temporary authorizations. But no such limitation is warranted. Significantly, the *Hunt* opinion, referring to the prior *CATCO* opinion, which involved *permanent* certificates issued after hearing,[22] rests the decision on the statutory power to condition such certificates, saying (376 U.S. at 523):

> * * * There we indicated that the Commission might avail itself of its power to condition the initial certification of natural gas into interstate commerce in order to prevent a triggering of general price rises. * * *

[22] The court below treats this language as applying only to temporary certificates because it was introduced by the sentence "[T]his Court previously discussed the use of the temporary certificate procedure in *Atlantic Refining Co.* v. *Public Service Comm'n, supra* [*CATCO*]." This it takes as indicating that "some of the more sweeping statements made in Catco where reference was made to conditional certificates without indication as to permanent or temporary must now be read as conditional *temporary* certificates." (R. 634–635, emphasis the court's). We think it clear that in *CATCO* this Court was well aware that it was talking of the protections required in the permanent certification of sales of gas and that its reference in *Hunt* to the "temporary certificate procedure" in *CATCO* was to the fact that the particular price conditions which the Court indicated in *CATCO* were necessary to protect the public interest were conditions to hold the line *temporarily* until the just and reasonable price could be fixed. The conditions in issue here are, of course, just such "temporary" conditions—doubly assured in that, by their terms, they expire in July 1, 1967, even if the appropriate area rate case has not been concluded by that date.

To be sure, there are significant differences between temporary authorizations and permanent certificates. The former are issued *ex parte* in order to take care of emergencies, and no hearing is held; the latter are granted only after provisions for notice and hearing have been satisfied. The former are issued pending disposition of application for permanent authority; the latter provide authority of long duration. The reasonableness of the condition obviously depends upon the situation to which it is addressed and the Court quite aptly observed in *Hunt* that it was not passing on "the extent of [the conditioning] power in permanent certification" (376 U.S. at 526). Certainly we do not contend that *CATCO* and *Hunt* granted the Commission *carte blanche* to impose any and all conditions without a showing that they were appropriate and necessary. We do urge that they sustain, among other things, the Commission's power to impose reasonable conditions designed to guard against the damaging effects of "triggering."

There is nothing in *Hunt* that supports the lower court's conclusion here that any condition in a permanent certificate that might impair the ability of a natural gas company to file and collect (subject to suspension) contractually authorized rate increases invades what the court describes as "the rights of a producer * * * under § 4" of the Act (R. 634). On the contrary, in rejecting similar contentions as to the interrelationship of the rate-changing provisions of Section 4 and the certification provisions of Section 7, this Court stressed, as it previously had in *CATCO* (360 U.S. at 391–392), that the rate-changing pro-

cedures of Section 4 are not a limitation on the Commission's authority under Section 7 to impose appropriate certificate conditions required by public convenience and necessity, and that "[t]he power granted to the Commission in § 4 does not come into play until after the initial certification of the natural gas into interstate commerce has been granted under § 7" (*Hunt, supra,* at 522). The Court, it should be noted, did not talk, in terms of "rights" granted to the producers under Section 4. Indeed, in *United Gas Pipe Line Co.* v. *Mobile Service Corp.*, 350 U.S. 332, 339, it had already made clear that "§ 4(d) [which prescribes the procedure for rate change filings] is simply a prohibition, not a grant of power. * * * The section says only that a change *cannot* be made without the proper notice to the Commission; it does not say under what circumstances a change *can* be made" (emphasis in original).

Finally, referring to the legislative history of the 1942 amendments of Section 7 (c) and (e), the Court said in *Hunt* (376 U.S. at 525–526):

> * * * The purpose of the amendments was to give "the Commission an opportunity to scrutinize * * * the characteristics of the rate structure * * * at a time when such vital matters can readily be modified as the public interest may demand. * * *" House Committee on Interstate and Foreign Commerce, H.R. Rep. No. 1290, 77th Cong., 1st Sess., 2–3. * * *
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> Clearly, the Commission was given the power to lay down conditions precedent to the entry of the natural gas into interstate commerce. More-

> over, the Commission has long recognized this obligation and has required modification of many tariff and contract provisions as a condition to the granting of a certificate. [Footnote omitted.]

Certainly the escalation provisions of a contract are crucial features of the "rate structure" that the Commission may "scrutinize" and require to "be modified as the public interest may demand * * * as a condition to the granting of a certificate."

If *CATCO* and *Hunt* left any doubt as to the Commission's authority to impose the kind of condition here involved, it was completely removed by the Court's subsequent decision in *Federal Power Commission* v. *Texaco Inc., supra.* That case sustained Commission rules refusing even to accept for filing applications for permanent certificates for contracts containing designated types of indefinite escalation provisions. In terms dispositive of the present issue, the Court, upholding the absolute proscription of any such contractually authorized rate increases, declared (377 U.S. at 42–43):

> * * * Natural gas companies that seek to enter the field with prearranged escalator clauses and the like have a built-in device for ready manipulation of rates upward. Protection of the consumer interests against that device may be best achieved if it is given at the very threshold of the enterprise. At least the Commission may so conclude; and the legislative history makes clear that its authority reaches that far. * * * [Footnote omitted.]

B. The court below also appears to suggest that the particular conditions in issue here may be invalid because they would "compel the producer to sell gas for nearly ten years at a price substantially less than the opening contract price and without the opportunity of being able to ever seek and obtain the automatic stepped up price increases provided for in the contract" (R. 635). The court's statement, we submit, is inaccurate.

With one exception,[23] the initial contract prices in issue here are at or below the 23.55¢ triggering levels. The Commission ordered only a moratorium on all increases *in excess* of 23.55¢, and then only until July 1, 1967, or the final decision in the area rate proceeding, whichever was earlier. And, of course, the Commission was not imposing a 10-year moratorium. The fact that the producers had voluntarily chosen to operate for approximately six years prior to the Commission's 1963 decision under authorizations that were still subject to judicial review does not affect the reasonableness of the time limit.

This limit must be considered in relation to the circumstances prevailing in 1963 when the present certificates were issued. Certainly as of that time the Commission could properly conclude that the public interest in holding the line pending completion of the Southern Louisiana Area Rate case would suffer from any certification of gas sales which, in the

[23] That one contract called for an initial price of 23.8¢ per Mcf (R. 177, 180). Under the Commission's decision the producer is free to file all but .25¢ of this amount.

interim, could escalate to prices at or above the triggering levels. The only risk attaching to acceptance of the conditioned certificate is that the rate fixed by the area proceeding might exceed 23.55¢, in which event the producers will have lost, during the interim period, the opportunity to collect an amount in excess of that figure. We point out that 23.55¢ is very substantially above the in-line price. We also point to the risks which consumers assume: (1) that the in-line price[24] will turn out to be higher than the just and reasonable price; (2) that allowing producers to file for and operate at a level between the in-line price and 23.55¢ may result in some injury to the public (depending upon the outcome of the area proceeding) because of the inherent defects of the refund procedure. See *Hunt, supra,* p. 37.

C. In its brief in opposition to certiorari (p. 13), ODECO contends that there is no substantial evidentiary support in the record for the Commission's finding that triggering and price redeterminations would result from the filing of rate increases above 23.55¢ per Mcf. However, after the Commission's final order imposing the condition, none of the producers sought, either in petitions for rehearing or by motions to reopen the record, to controvert the Commission's finding in this regard.[25] That being so, no

[24] In a subsequent case, *Union Texas Petroleum*, 32 FPC 254, decided July 23, 1964, the Commission found that the in-line price for gas in Southern Louisiana had remained constant at least through the end of 1962.

[25] In an application for rehearing, ODECO stated that there was "no evidence in the record * * * which pertains to the effect of filing by Odeco of its contractual price increases"

objection to the specific moratorium on filing increases above 23.55¢ per Mcf may now be considered. Section 19(b); *Sunray Mid-Continent Oil Co.* v. *Federal Power Commission*, 364 U.S. 137, 157; *Federal Power Commission* v. *Colorado Interstate Gas Co.*, 348 U.S. 492, 498; *Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission*, 324 U.S. 635, 647, 650–651.

Thus, the sole question on this aspect of the case is whether it is unreasonable, or arbitrary and capricious, for the Commission to condition producer certificates against the filing of rate increases which might trigger other increases while just and reasonable rates are being determined, with a maximum terminal date of July 1, 1967. We submit that such a condition is reasonable and should be sustained.

(R. 603). But the Commission's finding as to the general triggering effect of any price increase above 23.55¢ per Mcf upon other contracts of the pipeline customers here involved was not attacked and ODECO did not suggest that the filings it was authorized to make would not, in fact, have the results the Commission had stated required the specific limitation.

Significantly, when, in a subsequent case, some of the same producers involved here claimed on rehearing that the 23.55¢ was not the appropriate triggering level because there were some sales in the area being made at still higher levels, the Commission pointed out that many escalation contracts in the area are triggered by increases in less than the entire production area while others permit renegotiation based on prices of sales to three different pipelines in specified areas. In view of those many variations and the ambiguities of many of these provisions, the Commission concluded that the public interest required the fixing of a common moratorium ceiling at the level above which increases could prompt price escalations in the area rather than attempting to set different ceilings for different certificates. See *Union Texas Petroleum, et al.*, Opinion 436–A on Rehearing, issued October 8, 1964, 32 FPC 952.

III. THE COMMISSION PROPERLY REQUIRED REFUNDS, WITH INTEREST, OF ALL AMOUNTS COLLECTED IN EXCESS OF THE INITIAL IN-LINE PRICE

The court below upheld that part of the Commission's order which asserted authority to require refunds for the excess charges collected by the producers during the period when the original certificate authorizations were under review and subsequently, following reversal and remand, when the proper initial price for the gas was being determined. The court concluded, however, that the only proper measure of these refunds was the excess of the amount collected over the price ultimately determined to be the just and reasonable price for the gas—a measure differing from that adopted by the Commission. Before considering the question of the proper measure, we turn to the contention made by ODECO, petitioner in No. 26, that the court erred in holding that the Commission had any authority whatever to order refunds in the present circumstances.

A. THE COMMISSION HAD AUTHORITY TO IMPOSE A REFUND OBLIGATION

Having determined the proper initial price on remand from the courts of appeals, the Commission ordered the producers to refund to their customers[26] the amounts in excess of that price which the producers had theretofore collected under the invalidated certificates originally issued. Rejecting the producers' contention, now urged by ODECO, that the Commission's action amounted to an order for

[26] Provisions were otherwise made for appropriate flow-through of the refunds to the pipelines' customers.

reparations, for which the Gas Act makes no provision, the court below said (R. 638–639):

> * * * It is one thing for a Court to rule that under a valid certificate the Commission lacks the power to retrospectively review rates and impose retroactive refund orders. It is quite another for a Court to conclude that a Commission lacking the power to do the former may yet not have inherent power to recapture the fruits obtained under an invalid, that is illegal, order. * * *

We agree with the proposition, implicit in the court's statement, that the producers acquired no legal or equitable right to collect and retain their contract rates by electing to accept the certificates and commence operations while the certificates authorizing the collection of those rates were being challenged in the courts—challenged on the very ground that the rates were inconsistent with the public convenience and necessity. If the Commission's original certificate orders had not been subjected to judicial review, it is quite true that the Commission, lacking power to grant reparations, could not thereafter have determined retroactively that the initial prices were excessive.[11] But the situation is quite different where an order or judgment under which one party claims rights remains subject to review at the instance of parties adversely affected. It is a familiar principle that "a court will correct what has been wrongfully done by virtue of its process,"

[11] In such circumstances, any re-examination of the rates could be made only in an independent proceeding, with the Commission's order therein having only prospective effect.

Arkadelphia Milling Co. v. *St. Louis S.W. R. Co.*, 249 U.S. 134, 146. The precept is no less applicable where the error laid bare by the court is one which occurred at the administrative level and the agency is called upon to take corrective action ancillary to a remand. Court and agency attain the end "through coordinated action," *United States* v. *Morgan*, 307 U.S. 183, 191. The agency's duty on remand is "retrospectively [to] act as conscientiously within the bounds of the power given [it] by Congress as [it] would have done initially had [it] limited [itself] to [its] authority." *Addison* v. *Holly Hill Products, Inc.*, 322 U.S. 607, 620.

The point is aptly illustrated by the second *Chenery* case (*Securities and Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194). In sustaining a commission order issued on a prior remand, this Court held (332 U.S. at 200–201):

> When the case was directed to be remanded to the Commission for such further proceedings as might be appropriate [*Securities and Exchange Commission* v. *Chenery Corp.*, 318 U.S. 80], it was with the thought that the Commission would give full effect to its duties in harmony with the view we had expressed. * * * The fact that the Commission had committed a legal error in its first disposition of the case certainly gave Federal's management no vested right to receive the benefits of such an order. * * * After the remand was made, therefore, the Commission was bound to deal with the problem afresh, performing the function delegated to it by Congress. It was again charged with the duty of measuring the pro-

> posed treatment of the management's preferred stock holdings by relevant and proper standards. Only in that way could the legislative policies embodied in the Act be effectuated. * * *

The Court proceeded to sustain the commission's order despite the fact that it operated "retroactively" to prevent the realization of the anticipated profits which had motivated the original transaction (332 U.S. 203–204).[28]

The very course adopted in the instant case was followed by the Commission on the *CATCO* remand. There, it explained the difference between a refund order of the type here involved and an award of reparations as follows (27 FPC at 596):

> * * * We are not awarding reparations, in the sense of investigating an effective rate, finding it unlawfully high and ordering a refund; we are reissuing a certificate of public

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[28] See, also, *Delta Air Lines, Inc.* v. *Civil Aeronautics Board*, 280 F. 2d 636, 640 (C.A.D.C.), certiorari denied, 364 U.S. 870, where the court of appeals said:

"Nor do we agree with Delta's claim that it emerged from the former review with a legitimate expectation that the rate would not be reopened. True, the Supreme Court has held that mailpay rates, like railroad freight rates, once final, cannot be reopened. * * * But here the rate order was not final. We set it aside and remanded the case to the Board for further proceedings. Rather than supporting Delta's contention, we think that [*Arizona Grocery Co.* v. *Atchison, T. & S.F. Ry. Co.*, 284 U.S. 370, and *Transcontinental & Western Air* v. *Civil Aeronautics Board*, 336 U.S. 601, 608] support the view, at least by implication, that the Board has power to re-examine *non*-final rates."

Cf. *Public Service Commission of New York* v. *Federal Power Commission* (*Skelly*), *supra*, 329 F. 2d at 249; *Optical Workers' Union* v. *National Labor Relations Board*, 227 F. 2d 687, 689–690 (C.A. 5).

convenience and necessity in place of the certificate issued in June 1957, but with a price condition which in our opinion is consistent with the mandate of the Supreme Court.

ODECO's petition for certiorari (No. 26) suggests, however, that it would be inequitable to require refunds as to sales initiated "in reliance on" the original certificates. The fact is that, by initiating service while the certificates were still subject to review and possible modification, the producers assumed the risk that the consumer interests might be successful in their attempt to secure lower initial prices. Even in 1959, when the Commission issued the ill-fated unconditioned certificates, it warned that "it is the applicant which at least runs the risk of failing to substantiate the proposed price" (R. 53).

All of the contracts here involved, we note additionally, contained escape clauses. For example, the contract between J. Ray McDermott & Co., Inc., and Hope Natural Gas Co. provided for cancellation "in the event either party does not obtain a *final and non-appealable certificate* from the Commission on or before April 1, 1959, which is satisfactory to the party applying for the same" (R. 75; emphasis supplied). None of the producers made any attempt to defer initiation of sales until after they had received "final and non-appealable" certificates, undoubtedly because they believed the risks resulting from a delay in the commencement of service outweighed the risk that the contract price might be held to have been too high. In the circumstances, it cannot reasonably be contended that it is "inequi-

table" to require them to make refunds for the period in which they sold their gas at prices above those properly determined to be in the public interest.

Assuming that the reversal and remand worked some hardships, the risks were not unpredictable, and "the agency is the primary tribunal to balance these hardships against the public interest," *Delta Airlines Inc.* v. *Civil Aeronautics Board, supra,* 280 F. 2d at 641.

B. THE COMMISSION PROPERLY FIXED THE MEASURE OF REFUNDS AS THE AMOUNT THE PRODUCERS HAD CHARGED IN EXCESS OF THE APPROPRIATE INITIAL PRICE

As indicated above, having found that the producers had been charging higher prices than the proper in-line price during the period prior to certification pursuant to the decision now under review, the Commission ordered them to refund the difference to their customers. The court below concluded, however, that the only appropriate measure of respondents' refund obligations was the difference between what they had been collecting prior to the present certification and the price which might subsequently be determined, in a rate proceeding, to be just and reasonable. We believe that the court exceeded its powers in thus substituting its judgment for that of the Commission as to the proper measure of the refunds.

To the extent that the court's determination is based upon its assumption (R. 640) that no consumer is entitled under the statute to gas at a rate less than what is "just and reasonable" and "[n]oth-

ing in the law should encourage that result or its possibility," we believe that the ruling results from the court's misunderstanding of the statutory scheme, which we have discussed at some length in points I and II, *supra*. There is nothing in the Act which guarantees a producer the right to file for and collect what he asserts is a "just and reasonable" rate in circumstances where the Commission, in the exercise of its certificate power under Section 7 of the Act, has a basis for concluding that collection of such a rate is not consistent with the public convenience and necessity. To illustrate: The price at which the Commission authorizes a producer to commence operation pursuant to a temporary authorization under Section 7(c) might turn out to be below the "just and reasonable" rate subsequently set for such gas, but, as this Court held in *Hunt*, the Commission can nevertheless conclude that it is contrary to public convenience and necessity for the producer to file for and collect any higher rate prior to permanent certification. So here, the Commission can conclude that commencing service at more than the in-line price or charging more than a triggering price is contrary to the public convenience and necessity until the just and reasonable producer rates are determined. The short of it is that a producer has no "right" to operate except under a valid certificate and the standard for certification is the public convenience and necessity, which is not necessarily the same as whether the rates are or may be "just and reasonable."

The court of appeals suggests that if the Commission had issued certificates at the proper in-line price

in the first instance, there would have been no barrier to increased-rate filings (at least up to 23.55¢, and higher if the moratorium is invalid). Such increases, the court recognizes, would inevitably have been suspended and allowed to go into effect subject to refund. The amount of refunds, in that circumstance, would have been calculated on the basis of the difference between the price charged and the just and reasonable price subsequently determined. Accordingly, the court reasons, in order to achieve the situation which would have prevailed had the Commission fixed the proper initial price in the first instance, a similar refund standard should be applied here.

Assuming, *arguendo,* that it would have been permissible for the Commission to adopt this approach, there are a number of factors, overlooked by the court below, which fully warranted a different determination. In the first place, the court's proposed standard would completely deprive consumers of the benefits of the statutory thirty-day notice and the five-month suspension period, a not inconsequential matter in view of the wide spread between the initial price and the contract prices involved here.

Moreover, even assuming that this defect could be cured by providing that refunds should be measured by just and reasonable rates only for the period after the first six months of operation, there are additional reasons why the Commission reached a different conclusion. The lower court's approach operates on the assumption that the just and reasonable price will inevitably be above the in-line price. But this is not

necessarily true. If events proved otherwise, the effect of the court's standard would not be to place the producer in the position he would have been in if he had been certificated at the proper initial price in the first instance but to leave him substantially worse off. As a consequence, under the ruling below, there could be no certainty as to the eventual price the producer would secure for the period of operation prior to permanent certification, and the serious problems of royalty and tax payments referred to above (p. 18) would be unnecessarily compounded. In short, the main value, from the producers' standpoint, of fixing a firm initial price in a permanent certificate would be significantly lessened. See *supra*, pp. 17–18.

The other side of the coin is equally significant. Under the lower court's test, the consumers will be deprived of immediate refunds. This is important, for while the refund remedy is inadequate at best, its value in making the actual customers who have paid overcharges whole will vary inversely with the delay in its effectuation. Thus, if consumers in the present case must wait not only until the permanent certificates are issued but for still another indefinite period before they can hope to benefit from the courts' correction of the Commission's original error in permitting initial prices at levels equal to or higher than those this Court repudiated in *CATCO*, it is clear that, as a practical matter, they will be deprived of much of the fruit of their victory.

It is true, of course, that correction of agency errors in decisions upon which parties have in fact chosen to rely before they were final and unreview-

able will frequently cause some hardship to the parties who relied. See *Securities and Exchange Commission* v. *Chenery Corp.* and *Delta Air Lines, Inc.* v. *Civil Aeronautics Board, supra,* pp. 48–49. There is no means of achieving a perfect restoration of the the situation that would have prevailed absent the original error. A very persuasive consideration, therefore, is that the respondents in this case speculated upon the validity of certificates issued at prices which, as they were well aware, were in all cases substantially higher than those for which the consumer interests were contending, and which in all but one case were significantly higher than the price that had just been set aside by this Court in *CATCO.* If they had prevailed in the earlier appellate proceedings they would have had unconditioned certificates at these very high prices without any refund obligation, no matter how much lower the just and reasonable price might subsequently turn out to be. Having lost, they cannot complain because they may now find themselves in a worse position than if they had initially accepted certificates at a lower, non-controversial price and subsequently filed increases made effective subject to refund.

C. THE COMMISSION MADE A REASONABLE DETERMINATION AS TO THE RATE OF INTEREST PAYABLE IN CONNECTION WITH THE REFUNDS

Since the court below did not sustain the Commission's refund order, it declined to pass on the subsidiary objection raised by the producers to the Commission's requirement that the producers pay interest on the refunds in the amount of 6% until March 1,

1960, and 7% thereafter (R. 640). For the same reasons that we have advanced in urging this Court to consider the Commission's specific determination of the proper in-line price (*supra*, pp. 28–29), we urge the Court to examine the refund order *in toto* rather than leave the minor issue of interest unsettled.

The Commission's reconsideration of these cases pursuant to the legal principles enunciated by the courts eventuated in a holding that the pipelines, and through them the consumers, had paid the producers money to which the latter were not lawfully entitled. In short, the consumers have been improperly deprived of the use of their money and the producers have enjoyed the benefit of its use. A requirement for the payment of interest is therefore necessary in order to make the purchasers whole, prevent unjust enrichment, and effectuate the purposes of the Act. *Texaco Inc.* v. *Federal Power Commission*, 290 F. 2d 149, 157 (C.A. 5); *Mississippi River Fuel Corp.* v. *Federal Power Commission*, 281 F. 2d 919, 927 (C.A.D.C.), certiorari denied, 365 U.S. 827. In *Texaco* the Fifth Circuit sustained a Commission order for the payment of interest on refunds required as to operations conducted under a temporary authorization. Chief Judge Tuttle there said (290 F. 2d at 157):

> * * * the Commission was fully authorized, when ordering a refund under the terms of the condition, to require payment of interest at 6 percent. * * * Any other holding would, it seems to us, validate a retention of funds by the producer in a manner that would amount to unjust enrichment.

The present refund order is, in this respect, analogous to an N.L.R.B. back pay order. Several courts of appeals have uniformly sustained the Labor Board's newly adopted policy of requiring interest in such cases. *E.g., Philip Carey Manufacturing Company* v. *National Labor Relations Board,* 331 F. 2d 720 (C.A. 6), certiorari denied, 379 U.S. 888; *Marshfield Steel Co.* v. *National Labor Relations Board,* 324 F. 2d 333 (C.A. 8); *Revere Copper and Brass, Inc.* v. *National Labor Relations Board,* 324 F. 2d 132 (C.A. 7); *National Labor Relations Board* v. *Globe Products Corp.,* 322 F. 2d 694 (C.A. 4); *International Brotherhood of Operative Potters* v. *National Labor Relations Board,* 320 F. 2d 757, 760–761 (C.A.D.C.); and *Reserve Supply Corp. of L.I.* v. *National Labor Relations Board,* 317 F. 2d 785, 789 (C.A. 2).

There is no basis for the suggestion made by one of the producers in the court below that the Commission was required to adopt state law in prescribing interest as an incident to effectuating a federal statute. Cf. *Royal Indemnity Co.* v. *United States,* 313 U.S. 289, 296:

> * * * In the absence of an applicable federal statute, it is for the federal courts to determine, according to their own criteria, the appropriate measure of damage, expressed in terms of interest, for non-payment of the amount found to be due. * * *

While the Court there was speaking of a contractual obligation to the United States, the rule is no less applicable to the present case, which, in essence, in-

volves a quasi-contractual obligation due the Commission under a "plenary trusteeship" for the purchasers. *National Labor Relations Board* v. *Killoren*, 122 F. 2d 609, 612 (C.A. 8), certiorari denied, 314 U.S. 696. See, also, *United States* v. *Philmac Mfg. Co.*, 192 F. 2d 517, 519 (C.A. 3), and *Reserve Supply Corp. of L.I.* v. *National Labor Relations Board*, *supra*, 317 F. 2d at 789 n. 7.

In increasing its standard requirement from 6% to 7% on March 1, 1960, the Commission stated (Order No. 215A, 25 Fed. Reg. 1943, 23 FPC 474, 475):

> The Commission has determined that in view of the current cost of money now available for borrowing by natural gas companies, the interest payable on increased rates collected by both producers and pipeline companies subject to refund pursuant to the Act should be adjusted more in line with present commercial practices. * * *

None of the producers alleged or sought to prove that the Commission has misread "present commercial practices" or that the increase from 6% to 7% was not reasonably adapted to effectuating the purposes of the Act. We submit that, on the present record, it cannot be said that the current requirement of 7% interest is improper. In fact, in its orders granting stays in some of the present cases (*McDermott*, No. 20967; *ODECO*, No. 20989; *Kilroy*, No. 21029),[29] the court below expressly required 7%

[29] The *Kilroy* petition was withdrawn before the cases were decided below.

interest on refunds which may be required for the period of the stay if the Commission's order is sustained.

CONCLUSION

In conclusion, a word should be said concerning the court's statement (R. 640, n. 56) that—

> * * * As a precedent, our ruling is something less than the specter supposed, since the Commission and many others including this Court, look with hope to the day when the area pricing procedure will supply most of the answers. * * *

In our view, the court of appeals has underestimated the serious and continuing problem of interim control to which the Commission and this Court in the second *Phillips* case (*Wisconsin* v. *Federal Power Commission, supra,* 373 U.S. 294) have given such careful consideration. While the Commission has now issued its decision in the first area rate proceeding,[30] it would be unfortunate indeed to operate on the assumption that a viable system of interim price control is no longer of significance. Even with the most strenuous effort by all concerned, the ultimate rate determinations in many other geographic areas will necessarily be delayed by the procedural requirements of final administrative decision and judicial review in the several area rate proceedings. Meanwhile, gas is being sold in the interstate market and consumers are entitled to protection. Other cases pending before the Commission and the courts involve

[30] *Permian Basin Area Rate Proceeding*, Docket No. AR61–1, Opinion No. 468, issued August 5, 1965.

the problem of interim controls. In the aggregate, very substantial quantities of gas and large sums of money are at stake.

The three certificate conditions here involved—*i.e.* the imposition of an "in line" initial price, a partial moratorium or price increases, and a requirement of refund where amounts in excess of the proper initial price are collected—reflect a coordinated plan to hold the line on prices while just and reasonable rates are being determined. This Court's decisions support the present Commission order as a valid and reasonable method of providing, for this interim period, the "effective bond of protection from excessive rates and charges" to which consumers are entitled.

For the foregoing reasons, the judgment of the court below should be reversed and the Commission's order affirmed.

Respectfully submitted.

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AUGUST 1965.

APPENDIX A

The pertinent provisions of the Natural Gas Act, 52 Stat. 821, as amended, 15 U.S.C. 717–717w, are as follows:

SEC. 4 (a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this Act takes effect) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate

to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, State commission, or gas distributing company, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had

become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

* * * * * * *

SEC. 7(c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however,* That if any such natural-gas company or predecessor in interest

was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on the effective date of this amendatory Act, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after the effective date of this amendatory Act. Pending the determination of any such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest.

* * * * *

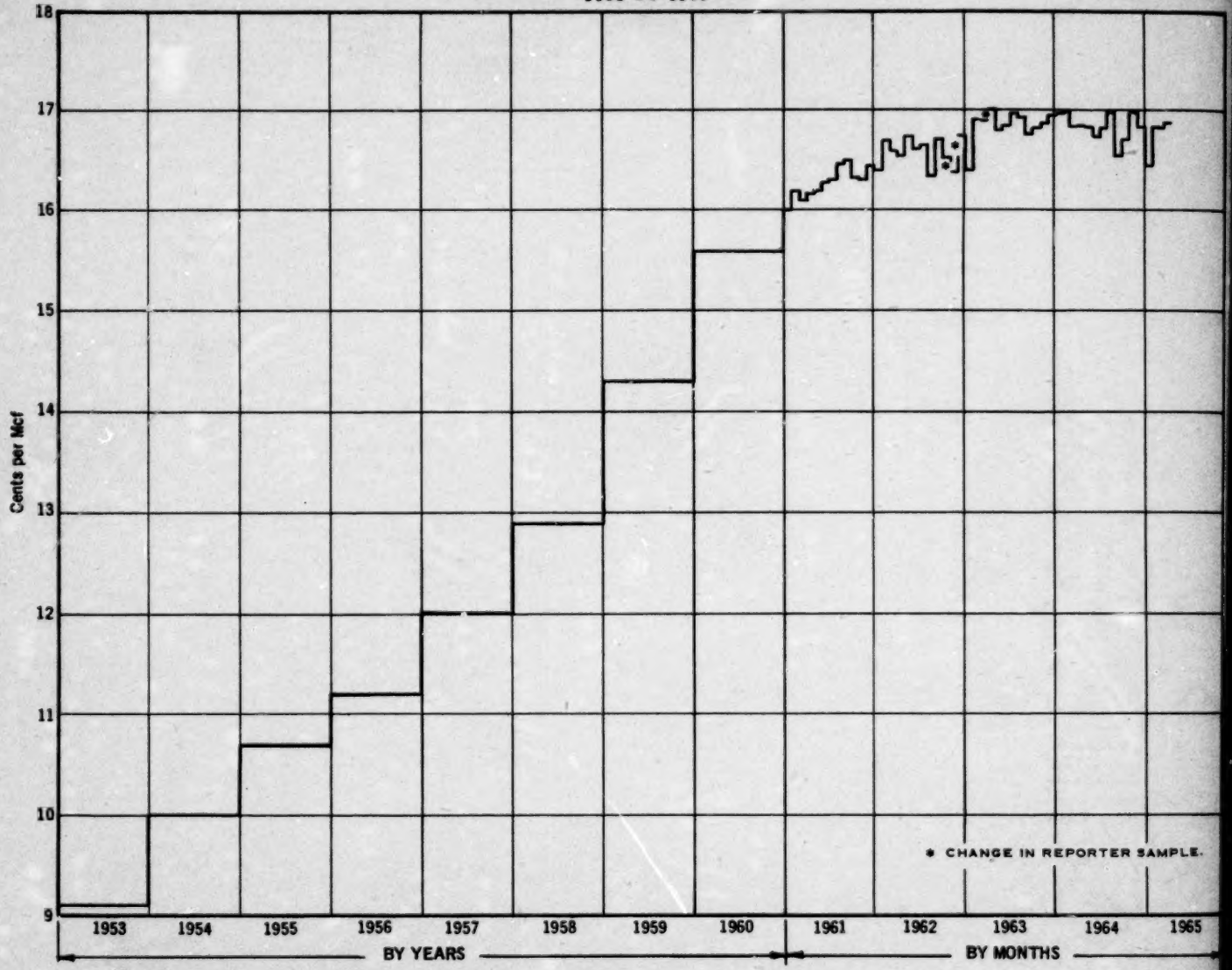
SEC. 7(e) Except in the case governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by

the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.

U.S. GOVERNMENT PRINTING OFFICE: 1965

APPENDIX B

FIELD PRICES OF NATURAL GAS
BY PRODUCERS OF PIPELINE COMPANIES
1953 TO 1965



SOURCE: 1961-1965: MONTHLY RELEASE - WHOLESALE PRICES AND PRICE INDEXES, U.S. DEPT. OF LABOR BUREAU OF LABOR STATISTICS COMMODITY CODE NO. 0531-01.03.
1953-1960: COMPILED FROM ANNUAL REPORTS TO THE FEDERAL POWER COMMISSION, FPC FORM NO. 2.

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In the

Supreme Court of the United States

OCTOBER TERM, 1965

Nos. 21, 22 and 31

THE UNITED GAS IMPROVEMENT COMPANY, LONG ISLAND LIGHTING COMPANY, and PHILADELPHIA ELECTRIC COMPANY, PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, FEDERAL POWER COMMISSION,

Petitioners,

v.

CALLERY PROPERTIES, INC., J. R. FRANKEL, MARGARET HUNT HILL, TRUSTEE, J. RAY McDERMOTT & CO., INC., OCEAN DRILLING & EXPLORATION COMPANY, PLACID OIL CO., CAROLINE HUNT SANDS and LOYD B. SANDS, and THE SUPERIOR OIL COMPANY,

Respondents.

BRIEF FOR RESPONDENTS, MARGARET HUNT HILL, TRUSTEE, CAROLINE and LOYD B. SANDS, and PLACID OIL COMPANY

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OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit (R. 619-642) is reported at 335 F. 2d 1004. The opinions of the Federal Power Commission, Opinion Nos. 398 (R. 549-593) and 398A (R. 606-617), are published at 30 FPC 283 and 682.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on August 14, 1964 (R. 643-644). By orders issued November 6 and 12, 1964, the time for filing petitions for writs of certiorari was extended to December 12, 1964 (R. 644, 645). Petitions were timely filed by the United Gas Improvement Company, *et al* (UGI) No. 21, the Public Service Commission of the State of New York (PSC) No. 22, Ocean Drilling and Exploration Company No. 26, and the Solicitor General on behalf of the Federal Power Commission (Commission) No. 32. Orders were entered granting all four petitions on March 8, 1965 (R. 645-647), 380 U.S. 931.

STATUTES INVOLVED

The pertinent provisions of the Natural Gas Act (Sections 4, 7 and 19, 52 Stat. 821, *et seq*, as amended, 15 U.S.C. 717-717w) are set forth in Appendix A to Brief of Petitioners in Case No. 21, PP. 1a-6a.

QUESTIONS PRESENTED

1. Whether, in a reopened certificate proceeding under Section 7 of the Natural Gas Act judicially remanded to afford Applicants an opportunity to augment the record, the Federal Power Commission may refuse to admit and consider probative cost and economic evidence adduced by producers to show their sales are required by the public convenience and necessity.

2. Whether, assuming the Federal Power Commission has authority to require refunds of amounts previously collected pursuant to unconditioned permanent certificates, the Commission may require retroactive refunds without first determining that the amounts required to be refunded were unlawfully collected.

3. Whether, in a reopened and remanded certificate proceeding under Section 7 of the Natural Gas Act, the Federal Power Commission upon reconsideration, after fixing an initial rate without any consideration of whether such rate is just and reasonable, may impose, as a condition to the reissuance of permanent certificates, a moratorium on the filing of contractually authorized rate increases pursuant to Section 4 of the Natural Gas Act.

STATEMENT

The Federal Power Commission proceedings upon which this appeal is predicated involves a group of natural gas sales which were commenced in 1958 and 1959 pursuant to permanent certificates of public convenience and necessity granted by the Commission pursuant to Section 7 of the Natural Gas Act. Upon appeal these certificates were remanded to the Commission for further consideration so that the producer-applicants would have a further opportunity to present additional evidence in support of their contract prices.

Specifically, on September 4, 1958, the Commission in its Opinion No. 315, 20 FPC 264, granted Respondents Hill and

Placid, along with other producers, unconditioned, permanent certificates of public convenience and necessity authorizing sales of natural gas to Transcontinental Gas Pipe Line Corporation (Transco) at a price of 21.5¢ per MCF plus 2.05¢ per MCF tax reimbursement. After complying with the Commission's requirements regarding the filing of their respective gas purchase contracts, sales were initiated. In the interim, however, UGI and others sought judicial review. Although Opinion No. 315 was at first affirmed by the Court of Appeals for the Third Circuit,[1] it was subsequently summarily remanded to the Commission by this Court with instructions for "a reconsideration and redetermination in the light of *CATCO, (Atlantic Refining Company v. Public Service Commission of the State of New York*, 360 U.S. 378 (1959))."[2]

The sale by Respondent Sands followed much the same pattern. On August 10, 1959, the Commission by Opinion No. 327, 22 FPC 378, granted an unconditioned, permanent certificate of public convenience and necessity to make a sale to Hope Natural Gas Company (Hope) at an initial price of 21.5¢ per MCF plus a tax reimbursement of 2.05¢ per MCF. Shortly thereafter, after establishing the Hope gas purchase contract as a rate schedule, deliveries of gas commenced. PSC and others, however, sought judicial review of Opinion No. 327. The Court of Appeals of the District of Columbia Circuit[3] reversed the Commission's order and re-

[1] *United Gas Improvement Co. v. Federal Power Commission*, 269 F. 2d 865 (3rd Cir. 1959)

[2] *Public Service Commission of New York v. Federal Power Commission*, 361 U.S. 195 (1959)

manded the case to the Commission with instructions to hold further hearings in which petitioners and other producer-applicants might if they so chose, "either augment the record so as to support certificate authorization without a price condition or to seek a certificate appropriately conditioned."

Significantly in each of these original certificate proceedings, the Commission decision was predicated upon rather limited contract negotiation and field price evidence. The purport of each remand thus being that the Commission, before issuing unconditioned certificates, should receive and consider more evidence not so limited. Thus it is the Commission's action following these judicial remands which is the subject of these appeals.

Contrary to procedure followed by the Commission in other remanded proceedings, when the foregoing judicial mandates were returned from the Court of Appeals, the Commission did not take immediate action.[4] Not until May 10, 1961, was each of the remanded proceedings consolidated with the Southern Louisiana Area Rate Proceeding, Docket No. AR61-2, *et al.* Some eight months later, without any hearing having been held in this area proceeding, on January 10, 1962, the Commission issued an order warning Respondents that the Commission might subsequently require as a condition to the re-issuance of permanent certificate authori-

[3] *Public Service Commission of New York v. Federal Power Commission*, 287 F. 2d 146 (D.C. Cir. 1960) cert. denied 365 U.S. 880 (1961)

[4] In the remanded *CATCO* proceedings the Commission immediately issued temporary certificates containing refund clauses to replace the permanent certificates vacated by the Supreme Court.

zation that Respondents make retroactive refunds of any revenues received from the subject sales to the extent, if any, that such revenues exceeded the rates ultimately found to be in accord with the requirements of the public convenience and necessity. (R.395) On March 7, 1962, in denying Respondents' Application for Rehearing of the January 10 order, the Commission severed Respondents' respective certificate applications[5] from the Area Rate Proceeding in AR61-2 and consolidated them with other similarly remanded certificate proceedings for a "separate and expeditious disposition." (R. 410).

Pursuant to this March 7 order, hearings were commenced on July 18, 1962, ostensibly for the purpose of permitting Respondents to augment the record so as to support unconditioned certificate authority as directed or suggested by the judicial remands. However, a rather abbreviated hearing was held in which essentially all of the evidence offered by Respondents was summarily rejected. The only evidence admitted and considered was very limited field price evidence, the sole purpose of which was to determine a so-called "in-line" price for 1957-1958. All other evidence was held irrelevant and immaterial. This was in spite of the judicial mandates and the Commission's statement in its March 7 order that:

> "The instant proceedings, however, involve contracts executed after 1956; and we recognize that some parties may wish an opportunity to show that the appropriate price line in these proceedings differs from that we

[5] Margaret Hunt Hill, Trustee, Docket No. G-14109; Caroline Hunt Sands, Docket No. G-17398; Placid Oil Company, Docket No. G-13183, G-13184.

determined in *Catco. Furthermore, we shall not foreclose any party from presenting evidence which he believes would compel the conclusion that a higher price would be in the public interest.*" (R. 416-417) (Emphasis added)

After conclusion of such hearings, the Presiding Examiner issued an initial decision on December 7, 1962. Exceptions to this decision were filed by various parties. On July 17, 1963, the Commission issued its Opinion No. 398[6] essentially adopting the findings of the Examiner in which it re-issued permanent certificates of public convenience and necessity to Respondents and other producer applicants; however, this time around they were conditioned upon a reduction in initial price to 18.5¢ per MCF plus a 1.5¢ per MCF tax reimbursement, and a refund with interest of all amounts previously collected in excess of that reduced price. In addition, a moratorium upon the filing of any price increase in excess of 23.55¢ per MCF was imposed pending the issuance of final decision in Docket No. AR61-2 or until July 1, 1967, whichever is earlier.

After timely filing petitions for rehearing and reconsideration, Respondents filed Petitions for Review in the Court of Appeals for the Fifth Circuit, alleging several errors made by the Commission. On August 14, 1964, the Court of Appeals for the Fifth Circuit issued its opinion in which it found that the Commission erred in these remanded proceedings in the following three respects: (1) in excluding cost and economic evidence, (2) in ordering retroactive refunds with-

[6] In Re Placid Oil Company, *et al.*, Docket No. G-13183, *et al.*, 30 FPC 283, 30 FPC 682.

out predicating the amount of refunds upon a "just and reasonable" rate determination, and (3) in imposing a price moratorium on permanent certificates. In view of these findings, the court below did not consider other questions and errors urged by Respondents, namely, the validity of the Commission's "in-line" price determination, or the requirement that interest be paid on the amounts refunded.

SUMMARY OF ARGUMENT

Once again this Court is called upon to construe the extent and breadth of the Federal Power Commission's authority under Section 7 of the National Gas Act in issuing certificates of public convenience and necessity. Specifically, somewhat as a sequel to this Court's decisions in *Atlantic Refining Company v. Public Service Commission of State of New York*, 360 U.S. 378, (1959) (CATCO), and *Federal Power Commission v. H. L. Hunt*, 376 U.S. 515, (1964) (Hunt), the Court is called upon to determine the propriety of the Commission's action in re-issuing certificates which had been judicially remanded to the Commission for further proceedings. The court below with *CATCO* and *Hunt* as the basis for its decision held that in this very limited frame of reference the Commission erred in (1) rejecting evidence in support of initial contract prices, (2) ordering refunds without determining that such amounts are unjust and unreasonable and (3) proscribing the filing of any price increases from 1958 through 1967.

1. Exclusion of Evidence: In relying upon this Court's *CATCO* and *Hunt* decisions, the court below was correct

in holding that the Commission erred in rejecting the proffered cost and economic evidence and that the Commission, in determining the price required by the public convenience and necessity, must receive and evaluate more than in-line price evidence. Moreover, these cases were judicially remanded for a fuller consideration of the price issue to afford Respondents opportunity to "augment" the record which already contained price data.

Price line evidence, consisting of price data relating to some but not all past sales, certainly is not all encompassing of the various aspects of the present or future public convenience and necessity. Evidence other than price data relating to a selected group of sales was especially critical in this case. The Commission in fixing the price line effectively freezes prices at the pre-Catco price levels without giving Respondents the opportunity to show "the reason why" their prices should be more than those selected by the Commission in 1957 and 1958.

The receipt and evaluation of such evidence is not the impossible task envisioned by Petitioners. Only three or four percent of the certificate applications require contested evidentiary hearings.[7] As demonstrated herein the Commission has ample resources and ingenuity to handle fairly this limited number of sales. Furthermore, consideration of cost and economic evidence need not necessarily be turned

[7] In 1962 96% and in 1963 97% of all independent producer applications were handled in non-contested proceedings. *42nd Annual Report of the Federal Power Commission to Congress* submitted January 9, 1963, and *43rd Annual Report of the Federal Power Commission to Congress* submitted January 3, 1964.

into a nigh interminable proceeding. As illustrated by a sale here involved, a full blown rate proceeding was tried in seven hearing days with an Examiner's decision issued within four months after the close of the hearing. The Commission's Rules and Regulations even require pipeline certificate applicants to present cost of service data. Such proceedings are not converted into full blown rate cases nor will it be necessary to convert every producer certificate proceeding into a full blown rate case. Regardless of the time required, the relevant and material evidence must be considered if the Act is to be properly administered.

There is no justification, prior to decisions in area proceedings as urged by Petitioners, for an interim standard for determining whether a sale is required by the present or future public convenience and necessity. To hold otherwise is to contend that Section 7(e) of the Act provides for two standards—one preceding area rates and a different standard thereafter. This is preposterous. There is only one standard under the Act and that standard requires the Commission to consider all factors prior to disposing of certificate applications.

2. Retroactive Refunds: Although disagreeing with the holding of the court below that the Commission had authority to require refunds in this case, Respondents do support the decision below, that refunds, if required, must be based on just and reasonable rates rather than the conditioned in-line price level. In the unique circumstances of this case, the court below adopted a procedure which balanced the equities of both consumer and producer. The con-

sumer is assured of gas at no more than just and reasonable prices, the ultimate goal of the Act. Likewise, the producer, if his contract price permits, will not be required to refund that portion of his rate which was just and reasonable. What could be fairer? This puts the parties in, as nearly as possible, the position they would have been in had the Commission properly conditioned the original certificates in 1958.

In ordering refunds on the sole basis of an in-line determination, without considering and evaluating Respondents' proffered evidence, Respondents have been denied due process of law and such action results in the taking of property without just compensation in violation of constitutional guaranties. Moreover, to measure the refunds by the in-line determination violates the specific provisions of Section 4 of the Act which provides that all rates be "just and reasonable" and any rate which is not just and reasonable is unlawful. In addition, to require refunds as a condition under Section 7(e) violates the provision which requires that all conditions be reasonable. It would be unreasonable to require producers to refund any portion of a just and reasonable rate, to force producers to serve consumers at a confiscatory rate or to sell gas at an unlawful rate. Moreover, the requirement of refunds based solely on the in-line determination has very serious and grave consequences with reference to these Respondents by causing them to suffer irreparable injury, by creating greater revenue deficiencies.

3. Price Moratorium: The imposition of a price moratorium under the guise of a Section 7(e) condition is nothing more

than an attempt to suspend rate increases. The permanent certificates here involved were issued in 1958 and 1959 and were never vacated. Thus the present moratorium, suspending rate increases for almost four years, was imposed some five years after the certificates were first issued. This court held in *CATCO (Atlantic Refining Company v. Public Service Commission of State of New York*, 360 U.S. 378 (1959) at page 390) that Congress did not give the Commission power under Section 7 to suspend rates. Although the Commission has requested an enlargement of its suspension powers, Congress has failed to extend that authority beyond the limited five months period under Section 4(e). The moratorium like the "in-line" price is a bar to just and reasonable rates. It will force some producer to serve consumers at confiscatory rates. The effect is to deny proper rates to consumers and producers without even considering the justifiable facts. Although upholding a moratorium in the issuance of *ex parte* temporary certificates, in *Federal Power Commission v. H. L. Hunt*, 376 U.S. 515 (1964), this Court clearly indicated that the rate changing provisions of Section 4 become applicable at the time of permanent certification. Regardless, there is no need for a moratorium in this case as illustrated by the fact that some of the sales involved in this proceeding are being made at prices in excess of the moratory level and none have triggered increases of other prices.

ARGUMENT

Before considering the merits of Petitioners' arguments, one very important fact must be emphasized, a fact which Petitioners apparently disregard as immaterial. The certifiicates which are here under review were before the Commission as a result of judicial remands with specific directives to give the producer-respondents an opportunity to present evidence supporting an unconditional certification. Contrary to the implication by the Petitioners, this case did not involve "new gas", and does not involve the question of under what conditions should such gas be permitted to enter the interstate market. The issue before the Commission in July of 1963, the time of the Commission action, was rather at what price should the Commission reissue certificates for sales which had been made and irretrievably committed to interstate commerce for a period, in some cases, in excess of five years. This retrospective nature of the Commission's inquiry in this case distinguishes it from the usual Section 7 certificate proceeding.

Admittedly, in the typical Section 7 proceeding involving an initial commitment of gas to interstate commerce, it is the Commission's function after a careful analysis to prescribe, if necessary, any "conditions precedent to the entry of natural gas in interstate commerce"[8] so long as such conditions are reasonable. If the Commission prescribes conditions, the producer in such cases has the option to either accept the conditioned authorization and commit his gas to the interstate market or find another market for his gas.

[8] *Federal Power Commission v. H. L. Hunt*, 376 U.S. 515, 526 (1964)

Unlike the ordinary Section 7 proceeding, the producers in this case were not afforded the choice of whether to commit their gas to interstate commerce.[9] This distinguishing "time" element although brushed aside by Petitioners cannot be over-emphasized, for it very clearly dramatizes the correctness of the decisions of the court below with respect to the issues decided. Of course, Petitioners' argument is not directed to these facts; it is directed toward the ordinary initial sale requiring certification. Although, as we will demonstrate, the court's decision may be applied to the ordinary Section 7 sales, there can be no doubt the decision below must be upheld as to the sales in this case.

I.

THE COURT BELOW WAS CORRECT IN HOLDING THAT THE COMMISSION ERRED IN EXCLUDING ALL EVIDENCE OTHER THAN IN-LINE PRICE EVIDENCE.

The Commission, in determining the statutory issue of whether Respondents' sales were required by the public convenience and necessity, refused to consider any evidence other than that purporting to show whether such sales were in-line with a *selected* group of other sales in the area. Without deciding the propriety of the Commission's in-line determination, the court below held that, although an import-

[9] In its Order of March 7, 1962, setting these remanded proceedings for hearing the Commission made this clear:

> "By the same token, there can be no private option here to accept or reject the results of our initial rate review at the regulated company's whim, any more than a company is free to accept or reject the results of a rate review proceeding under Section 4 or 5 of the Act."

ant factor, whether the proposed contract prices were in-line was merely one factor to be weighed along with other factors in determining whether such sales were required by the present or future public convenience and necessity. In short, the court held that a proper consideration of the Act and this Court's *CATCO* decision compels the holding that the Commission does not fulfill its statutory duty by merely making a limited inquiry into whether the price is "in-line".[10] Moreover, the court below found that the Act requires the Commission to "hear and evaluate all relevant evidence bearing on public convenience and necessity when it is urged, or held, that the proposed price is out of line." (R. 632)

The arguments now advanced by Petitioners in support of the Commission's "in-line price only" criteria for disposing of certificate cases may be categorized into two basic arguments. First, Petitioners assert that this Court in *CATCO* authorized a "fix and freeze" regulatory scheme which requires the Commission (1) to *fix* a so-called in-line price at the pre-*CATCO* price levels and (2) to *freeze* all subsequent sales at those prices until some pro-

[10] In view of its ruling that the Commission must consider more evidence, the court below did not decide the propriety of the Commission's finding. Therefore, that issue is not now before this Court. However, it is significant to note that this "in-line" determination was the *sole* basis upon which huge price reductions and refunds were ordered and that the Commission utilized only 41% of the sales made during 1957-58 and only 27.1% of the volumes of gas introduced into interstate commerce during such period (R. 558, 506; Ex. X-42, Sch. 3 & 4, R. 291-3). In fact, all prices above 18.5¢ were eliminated (R. 506, 558), with the Commission admitting that "25 percent of the 1957 contracts *not subject to court or Commission review* were priced at 21.3 cents or more, and 25 percent had a price 22 cents or more in 1958," (R. 557, 502; Ex. X-42, Sch. 7, R-297) (Emphasis Added)

spective just and reasonable determination can be made. Second, Petitioners argue that if required to do otherwise, effective regulation of producers under the Natural Gas Act will be administratively impossible. Neither of these arguments is well founded.

A. Neither the Natural Gas Act nor CATCO Authorizes a Price Freeze.

The requirements of Section 7(e) of the Act, the Commission's authority for the issuance of certificates, are mandatory and not discretionary. That section in pertinent part provides as follows:

> "A certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale * * * if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed * * * and that the proposed service, sale * * * is or will be required by the present or future public convenience and necessity * * *"

Since Respondents were willing and able to make, and had in fact been making for five years, the sales which were the subject of inquiry, the issue before the Commission was whether the sales were required by the *present* or *future* public convenience and necessity.

In determining this statutory issue, Section 7(c) of the Act specifies that "* * * the Commission shall set the matter for *hearing* and shall give such reasonable notice of *hearing* thereon * * *" The Administrative Procedure Act,[11] in defining evidence to be adduced during such administrative

[11] 60 Stat. 237-244, 5 USC 1001-1011.

hearings, provides that every litigant "* * * shall have the right to present his case by * * * evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts."* Unquestionably, the Natural Gas Act contemplates and requires the receipt and consideration of evidence in determining the requirements of the *present* or *future* public convenience and necessity.

Especially was the 'right to be heard' imperative in this case, since the Commission was operating under specific judicial directives from the Court of Appeals, to hold further hearings in which Petitioners "* * * might * * * augment the record so as to support certificate authorization without price condition * * *",[12] and from this Court for "* * * a reconsideration and redetermination in the light of *CATCO*, * * *"[13] As this Court is aware, the very basis of the reversal of the Commission's action in *CATCO* was the lack of evidence, not the tender of 'too much' evidence.

Next, in considering what evidence is germane to a determination of the *present* or *future* public convenience and necessity, this Court has repeatedly emphasized "the importance of considering and evaluating all factors bearing upon the public interest." *Federal Power Commission v. Transcontinental Gas Pipe Line Cor.*, 365 U.S. 1 (1961). In *CATCO* this Court admonished the Commission to make "* * * a more careful scrutiny and responsible reaction to initial price pro-

* 5 USC 1007(c)

[12] *United Gas Improvement Co. v. Federal Power Commission* 269 F. 2d 865 (3rd Cir. 1959)

[13] *Public Service Commission of New York v. Federal Power Commission* 361 U.S. 195 (1959)

posals of producers under Section 7," emphasizing that "[t]heir proposals must be *supported by evidence* showing their necessity "to the present or future public convenience and necessity . . ." (360 U.S. at 391). (Emphasis added) In discussing the lack of evidence presented, the Court found significant that "no effort was made to give the reason why" the proposed price was some 70% higher than the weighted average cost of existing gas to the purchaser. (360 U.S. at 393).

More recently this Court in *Hunt* characterized the purpose of Sections 7(c) and (e) as affording "the Commission an opportunity to scrutinize the financial setup, the adequacy of gas reserves, the feasibility and adequacy of service, and the characteristics of the rate structure * * *" (376 U.S. at 525). Consideration of these factors, the Court recognized, makes "hearings under Section 7(e) for permanent certification * * * time consuming." (376 U.S. at 520.) In the same connection this Court suggested that if a producer wishes "to avoid the delay incident to a hearing for permanent certificate," (376 U.S. at 523), he may apply for temporary authorization.

It is apparent from *CATCO, Transco* and *Hunt* with their emphasis upon a time consuming hearing under Section 7, that this Court did not intend to transform the *present* or *future* public convenience and necessity into a mere 'in-line' determination. Certainly this Court in *CATCO* did not sanction a price freeze at 1956-58 price levels as urged by the Petitioners herein. The very basis of these remanded proceedings was for a reconsideration in the light

of *CATCO* wherein the Commission was reversed for failure to give the proper and full consideration to the price issue. To correct this error, the Commission has now ignored all other factors except the in-line price. Rather than heed the admonition of *CATCO* to give *full* consideration to price, the Commission has further restricted its consideration to only one facet of price. As the court below recognized, a consideration of the 'supply and demand' economic factors bears directly upon the price at which gas is required by the *present* or *future* public convenience or necessity (R. 629). To ignore considering such factors deprives the consumers the full protection envisaged by the Act.

The Fifth Circuit's construction of the Act and its interpretation of *CATCO* on this point, are not without support among other circuit court decisions. These decisions, some cited by Petitioners, although upholding the authority to certificate prices at the so-called in-line price levels,[14] have consistently rejected the contention that prices must be frozen at the pre-*CATCO* in-line price level.

The Ninth Circuit[15] rejected as being without merit the contention that the price line must necessarily accord with the pre-*CATCO* line. It went further to set forth factors and circumstances under which permanent unconditioned

[14] Significantly, in each of these cases upholding the in-line certification procedure, the issues were limited strictly to a determination of the appropriate price line and the Commission did not reject evidence offered by the producers purporting to show the reason why their prices, if out of line, should be certificated.

[15] *United Gas Improvement Co. v. Federal Power Commission*, 283 F. 2d 817, 821 (9th Cir. 1960), cert. denied, 365 U.S. 879 (1961).

certificates might be issued "notwithstanding the fact that the proposed price is out of line." Likewise, the Tenth Circuit[16] recognized that circumstances may require the certification of a sale when the price is out of line. The D.C. Circuit[17] and the Fifth Circuit[18] in earlier decisions suggested the same alternative.

Undeniably, the Commission's administrative burdens would be eased to some extent if hearings were not required in issuing certificates under Section 7. Regulation by *fiat* is immeasureably simpler than regulation required by the Act based upon hearings, evidence and argument. The computation of an in-line price, as the Commission has here done, which is an arithmetic averaging of selected prices, could as easily be done in chambers without the necessity of hearing. However, such could hardly be reconciled with the statute. Rather apologetically, the Petitioners admit that this is a deviation from the statute. They merely justify it as an interim measure to hold down prices until just and reasonable rates can be determined in the area proceedings. However, as the court below emphasized, regardless of how laudable its aim, the Commission must comply with the basic statutory framework. As the court noted, "* * * it is inconceivable that Congress meant to freeze rates to 1956-58 or to any other particular time for that matter." (R. 630)

[16] *United Gas Improvement Co. v. Federal Power Commission*, 287 F. 2d 159, 163 (10th Cir. 1960).

[17] *Public Service Commission of New York v. Federal Power Commission*, 287 F. 2d 143, 149 (D.C. Cir. 1960).

[18] *United Gas Improvement Co. v. Federal Power Comission*, 290 F. 2d 133, 138 (5th Cir. 1961).

B. Regulation of Producers is Not Administratively Impossible Under the Act if Something Other Than an In-Line Price Standard is Utilized.

The Petitioners assert that consideration of evidence other than in-line evidence bearing on the public convenience and necessity issue would "hopelessly clog administration of the Act" (Comm. Br. p. 16). Such a requirement, according to PSC, would result in confusion of such proportions as to constitute "a nightmare at both the trial and initial decisional levels." (Br. p. 26) Great alarm is expressed that every producer certificate proceeding would be converted into long, drawn out "full blown" rate proceedings in which the voluminous evidence must be received and evaluated thus impairing the administration of the Act. Such speculative fears are without citation of factual support and are demonstrably false.

The Commission's own experience and its admission that the use of "in-line" or guideline prices in certificating new sales have been effective in holding the level of contract prices bely Petitioner's argument. An effective system of issuing certificates is not only possible under the Act but easily workable if the Commission will only recognize that a *few* cases must be decided on the basis of contested evidentiary hearings. Only a few producer applications for certificates coming before the Commission are contested; therefore, only a small number require evidentiary hearings. Even those need not be unmanageable or unwieldly with the receipt of evidence.

Virtually all certificate applications are disposed of in one of three ways:

(1) *Non-contested certificates.* Applications at or below the price line, or applications where producers will accept a price reduction to the price line upon permanent certification[19] are handled under a shortened certificating procedure, 18 CFR Sec. 1.20, which requires neither an appearance of the parties nor the introduction of evidence other than the sworn application filed by the producer. The bulk of all certificate applications are so handled. The Federal Power Commission 1963 Annual Report states that during 1962, "96% of all independent producer certificate applications were handled in this manner."[20] The 1964 Annual Report states that in 1963, 97% of all independent producer applications were thusly handled.[21] Therefore, only three or four percent of all sales now require evidentiary hearings!! This bears out the admission by the Commission that "experience has shown that once the firm, initial price has been set * * * many producers * * * will continue to operate at this figure." (Br. pp. 18-19) Since there are only a small number of certificate applications remaining (three or four percent), the Commission by statute may dispose of these proceedings after hearings with dispatch.

(2) *Conditioned Temporary Certificates.* If the price of a proposed sale is above the prevailing guideline price, the

[19] An example is cited in Appendix A, page 45 *infra*

[20] 42nd Annual Report of the Federal Power Commission to the Congress, submitted January 9, 1963, Page 89 thereof.

[21] 43rd Annual Report of the Federal Power Commission to the Congress, submitted January 3, 1964, Page 128 thereof.

producer may accept an appropriately conditioned temporary certificate.[22] He is thus able to commence deliveries of gas immediately and commit his gas to the interstate market. However, in so doing, he subjects himself to the burden of establishing that his higher price is required by the public convenience and necessity in a permanent certificate hearing, and to possible refunds if he fails. By following this alternative, the producer also gives up his option to reject the permanent certificate when tendered.

(3) *Permanent Certificate Hearings.* Finally, in cases in which consumer protection requires an evidentiary showing, the producer will be required to present sufficient evidence to show that the proposed sale is required by the present or future public convenience and necessity and the reason why the proposed price is appropriate. This will enable the Commission to consider all factors of the present and future public convenience and necessity and afford the producer an opportunity to accept or reject the tendered certificate.

The significant point about the latter two categories and on which the parties herein are at loggerhead is that the Commission must *receive* and *consider* proffered evidence. Of course, time will be consumed in hearing and evaluating the evidence in such proceedings, however, that is the express statutory purpose of requiring the producers to secure certificates of public convenience and necessity prior

[22] See Appendix "A".

to introducing their gas into interstate commerce. Thus, whatever time is required is in furtherance of the administration of the Act. To permit the Commission to ignore or defer consideration of relevant and material facts presented by any party would be in direct violation of the Act and not in the administration of the Act.

This case itself illustrates how few cases will require evidentiary hearings at all. Originally, some 74 dockets were consolidated in these proceedings. Now only the sales of eight producers remain for decision. Moreover during the period from January 1, to June 30, 1965, out of 827 certificates issued,[23] only three were conditioned to require a reduction in the initial sales price. Included in that number were many certificates issued after the producer accepted a proposal by the Commission to accept a permanent certificate at a conditioned rate. Presumably, these producers were willing to accept such permanent certificates at lower prices and avoid the experience and expense of a Section 7 hearing.

Furthermore, it is feasible that the Commission in the few proceedings requiring evidentiary hearings could receive cost evidence without converting such hearings into a full blown rate "nigh interminable" proceeding. The Commission now does just that in handling pipeline certificate ap-

[23] FPC Press Release No. 13844 issued May 25, 1965, covering first quarter, 1965 and FPC Press Release No. 13985 issued August 23, 1965, covering second quarter, 1965.

plications.[24] One of the more recent examples is the Transwestern Pipe Line Company consolidated proceeding, FPC Docket Nos. 20464, *et al.*, wherein the Commission's counsel specified that the cost of service studies were not shown for the purpose of converting this proceeding into a rate case or to recommend a precise method of allocation for the future but rather only to ascertain that the proposed rate is 'probably' just and reasonable.

The key to reducing the length and volume of the evidentiary hearing in disposing of this *three or four percent* is in the establishment of evidentiary standards or guides by which the parties can be guided in preparing their evidence for certificate hearings.[25] Once standards for the receipt and consideration of specific evidence are established, there will be no need for any of the parties to submit more than the minimum data required to dispose of the pertinent issues.

Of course, even without the guide lines, the so-called "full blown" rate hearing is not the nigh interminable monstrosity portrayed by Petitioners. This may be illustrated by the

[24] Federal Power Commission Regulations under Natural Gas Act, 18 CFR 157.14 requires that all pipeline applications include the following exhibits:

1. Exhibit "N" entitled "Revenues — Expenses — Income", which sets forth annual revenues, volumes of gas sold and operating expenses.
2. Exhibit "P" entitled "Tariff", shall, when the new rates will change the applicants' cost of service, include:
   (a) System cost of service for first year after new service commenced;
   (b) Allocation of such cost;
   (c) Rate base and rate of return;
   (d) Gas operating expenses functionally segregated;
   (e) Depletion and depreciation.

[25] *Morgan v. United States*, 304 U.S. 1 (1938); *Hill, Trustee v. Federal Power Commission*, 335 F. 2d 355 (5th Cir. 1964)

facts of this case. Respondent Sands filed an increase in its contract price to 24.55¢ per Mcf. — the same contract involved in this case. This increase, handled as a full blown rate hearing under Section 4(e), consumed only seven hearing days. Within four months after the evidentiary record was closed, the Examiner had rendered his decision holding the 24.55¢ price to be just and reasonable. These eight producers who remain in this proceeding could have been submitted to a "full blown" rate hearing in a much shorter time than this appeal has taken.

C. The Exclusive In-Line Price Standard Has Numerous Inherent Practical Weaknesses.

The practical application of the so-called 'in-line price only' standard or the 'fix and freeze' standard has numerous deficiencies. First, it has a rather serious impact upon the supply of gas to the interstate gas consumer. If in the issuance of certificates the Commission is restricted to sales which are in-line with other sales in the area, the gas producer may for legitimate reasons be forced to reject a certificate at such price levels and divert his gas elsewhere. There being no other proceeding under the Act by which he can present evidence establishing that his proposed sale is or will be required by the *present* or *future* public convenience and necessity, the Commission's in-line standard will forever preclude a presentation of justifying evidence. The resultant effect is that the supply is then lost to the interstate consumer. Especially is this tragic when the circumstances may be such, that had the Commission merely heard the producer's case, it, too, would have concluded

that because of other factors, the public convenience and necessity required the certification of the proposed sale irrespective of the in-line price determination. Certainly, such a possibility was contemplated by this Court when it called for the producers to show the 'reason why' their out-of-line prices should be certificated.

Likewise incongruous is the justification of the in-line standard on the basis that it applies only until the determination of just and reasonable rates on an area basis. Presumably at that time a different standard will be applied. This theory leads to preposterous results. It assumes that there are two statutory standards for public convenience and necessity — a *before* standard and an *after* standard! To state such a proposal demonstrates its absurdity. Its practical application is even more ludricous. Only four area rate proceedings have been initiated, only one has been completed. Is there one standard for determining the public convenience and necessity in the Permian Basin area where area rates have been established[26] while another standard is applicable in other areas where area rate proceedings have not even been instituted? Any *before* and *after* standard must be premised on something other than the Natural Gas Act.

Furthermore, this blanket price freeze concept until the area rates have been determined ignores the recognition by the Commission in its first area rate determination that there may be exceptions to the rates determined. The exceptional circumstances are to be considered in subsequent

[26] Area Rate Proceeding, Docket Nos. AR61-1, *et al.*, Opinion No. 468, issued August 5, 1965, ... FPC .....

hearings. If after the area rates there are exceptions whereby an applicant may show the "reason why" his sale should be permitted at a price higher than the area rate, there should also be such exceptional circumstances before the area rate determination.

The decision below on the evidence issue is unquestionably sound. The cases were remanded for the taking of additional evidence. All that Respondents sought was the opportunity to show "the reason why" their sales (among the only three of four percent requiring evidentiary hearing) should be certificated at their contract prices, assuming, without admitting, that their contract prices were out of line. The Commission erred in denying them the opportunity to show the 'reason why' and present justifying evidence. Such was required by the Natural Gas Act, by this Court's *CATCO* decision, by the specific judicial remands in this case, and contrary to Petitioners' assertions, the effect of the Court's decision will not impose upon the Commission an unworkable administrative burden in regulating under the Natural Gas Act.

II.

THE COURT BELOW WAS CORRECT IN HOLDING THAT THE MEASURE OF REFUNDS MUST BE THE JUST AND REASONABLE STANDARD AND NOT THE IN-LINE STANDARD

The Petitioners next attack the decision below as to the measure of refunds authorized. Although the court below held that refunds were proper, "* * * to meet the exigencies of the unique case," it held that the amount of refunds "must

be based, not on the conditioned price when fixed, but on the difference between the price collected and the rate found in a proper proceeding to be the "just and reasonable one." (R. 640-641)

Respondents do not agree with the holding below to the extent that it authorizes refunds in this case. It seems obvious that in approving retroactive refunds, the court below has sanctioned a reparation order which this Court has held to be beyond the Commission's authority.[27] However, if refunds can validly be required, they must be predicated upon a "just and reasonable" determination rather than a so-called "in-line" price determination.

Petitioners contend that the proper measure for determining the amount to be refunded was appropriately fixed by the Commission at the so-called "in-line" price level.[28] Yet, no party pretends that the "in-line" price level so determined is "just and reasonable."[29]

The Act makes no provision for price refunds except under Section 4(e). Therefore, any retroactive refund requirement must be based on equitable principles. [30] In fact, in

[27] *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591, 618 (1944). Cf. Brief of Petitioner, Ocean Drilling & Exploration Company, Case No. 26.

[28] The question of whether or not the "in-line" price was fixed at the appropriate level was not decided by the court below and is therefore not before this court. However, it is important to note that the "in-line" price was determined by an inquiry limited to the evaluation of price data relating to a *selected* group of sales. (Cf. f.n. 10 *supra)*

[29] Section 4(a) of the act declares any rate that is not just and reasonable to be unlawful. Not past rates, not present rates, not future rates, but any rate, past, present or future. Thus refunds, if any, must be measured by the just and reasonable rate level and not the "in-line" level.

[30] *Public Service Commission v. Federal Power Commission*, 329 F. 2d 242 (D.C. Cir. 1964) cert. denied 377 U.S. 963 (1964)

setting these remanded proceedings for rehearing the Commission stated: "The remedial action to be taken by us in either event will turn on the equities present." (R. 412) Thus, the inquiry is not whether Respondents should have received the money, but rather, having received it, whether they should be required to repay all or any part of it.

In this difficult and unusual situation, the decision below is fair to all parties, both consumer and producer alike. Its full import simply requires that the rates during both the prior period (1958-1963) and the future period (1963 and following) be "just and reasonable", no more and no less, except where prohibited by contract. What could be fairer? Neither party can thus reap a windfall at the expense of the other.[31]

As the court below recognized, the clock cannot be completely turned back to 1958, and the parties cannot be put in exactly the same position that they would have been had the Commission acted correctly in its initial certification. However, as PSC suggests, (Br. p. 32) the parties should, as nearly as possible, be put in that position. Recognizing this fact, the court below suggested a balancing procedure where-

[31] However, Petitioners contend that the standard suggested by the court below overlooks the consumer's benefit of the suspension period. They argue that had the Commission in the first instance acted correctly, and had the producers filed a price increase, such increase would have been suspended for the five months' statutory suspension period. This speculation does not detract from the solution arrived at by the court below, and furhermore, Petitioners have no objection to proceeding on that assumpion, i.e., assuming that the full suspension was imposed. Of course, to do so assumes that the Commission would have arbitrarily exercised its full suspension authority under Section 4(e). Such assumption hardly coincides with the purpose for which the Commission was given such suspension power.

by the producer would retain no more than the "just and reasonable" price during this interim period of 1958-1963. The consumer would thus be given exactly that which he is entitled under the Act and at the same time, the producers would not be subjected to the irreparable loss which they might suffer under the Commission's order.[32]

A. The Constitution Guarantees Every Party Due Process of Law and Just Compensation For Its Property.

The ordering of refunds of all amounts collected in excess of the so-called "in-line" price without receiving and evaluating Respondents' evidence violates constitutional guaranties. Especially is this true under the circumstances of this case, where the right to accept or reject the tendered certificates was not available. The Fifth Amendment to the United States Constitution provides in pertinent part that:

> "No person shall * * * be deprived of * * * property, without due process of law, nor shall private property be taken for public use, without just compensation."

Regardless of how the price level was determined, if such price level is to be used as a measure of refunds, evidence was clearly admissible as to whether such rate level was just and reasonable or confiscatory. The Commission denied Respondents the right to introduce evidence on either of these standards. The constitutional guaranty includes the right of a party whose rights are to be affected to introduce evi-

[32] This was essentially the alternative suggested by Commissioner O'Conner in his dissent (R. 586) that the measure of refunds should be computed on the basis of just and reasonable price levels.

dence and have judicial findings based upon it. *Baltimore & O. R. Co. v. United States*, 298 U.S. 349, 368-369, (1936).

Due process of law protects against arbitrary action. The form of a proceeding in which a person is permitted to defend his property rights cannot convert the process used into "due process of law" if the end result is to deprive him of his property without compensation. *Washington ex rel Oregon R. & Navigation Co. v. Fairchild*, 224 U.S. 510, 524 (1912). Thus, the hearing in which Respondents were permitted to defend one issue — the price line — but from which the relevant and material evidence was excluded, did not constitute due process.

Requiring Respondents to refund revenues based upon a rate level that will not yield sufficient revenues to pay operating expenses, taxes and provide a reasonable return on the property invested is a clear violation of these constitutional guaranties of just compensation and due process.

It has been approximately seven years[33] since Respondents commenced deliveries in reliance upon the unconditioned certificates. Their excluded evidence showed that the prices collected are insufficient to pay taxes, operating expenses and provide a reasonable rate of return on the property invested.

For Respondent Placid the prices collected yielded revenues to provide a rate of return of only 1.5% on gas in-

[33] Five years prior to the order on remand issued July 17, 1963, and two years since that date.

vestment under an allocation method previously used many times by the Commission[34], (Ex. X-2, R. 255) and a company-wide rate of return of only 8.6%[35] on all oil and gas operations (Ex. X-2, R. 256). Any reduction in the price or refunds based thereupon would reduce such rate of return (Ex. X-2, R. 256).

Respondents Hill and Sands suffer an even greater revenue deficiency. The price collected did not yield sufficient revenues to return all gas operating expenses (Ex. X-14, R. 267). The combined oil, liquid and gas current cost actually exceeded combined oil, liquid and gas income (including proposed gas rate increases), so that there was no revenue left to provide for a rate of return on the combined oil, liquid and gas investment (Ex. X-13, R. 264, 265).

Moreover, in a separate Section 4(e) proceeding[36] an Examiner found that a rate of 24.55¢ per MCF was just and reasonable[37] The Examiner's just and reasonable rate de-

[34] The application of this method was held to be deficient for Respondents in a separate rate proceeding *In Re H. L. Hunt, et al.*, Docket No. 467, *et al.*, by Opinion 369 and order issued November 30, 1962. 28 FPC 897. Upon review the Court of Appeals for the Fifth Circuit, *Hill, Trustee v. Federal Power Commission*, 335 F. 2d 355, (1964), remanded the case to the Commission with directions to afford these Respondents an opportunity to recast the evidence. However, a change in the application of this allocation method cannot affect the overall return of 8.6%, nor can any reasonable application of the method appreciably increase the 1.5% rate of return on gas properties.

[35] The Commission found a 12% rate of return proper for the gas producing industry in its Permian Basin Opinion No. 468 issued on August 5, 1965.

[36] In *Re Caroline Hunt Sands*, Docket No. RI 64-356.

[37] The Examiner's decision is pending before the Commission upon exceptions. Since the Section 4(e) rate increase was filed pursuant to the *court below issuing* a "stay" of the Commission's imposed price moratorium, the rate increase filing becomes moot if this Court reverses the court below and upholds the Commission's imposed price moratorium.

termination relates to the identical sale which Respondent Sands has involved in the instant case.

If Respondents are required to refund any portion of the revenues based upon the prices collected, they will suffer even greater deficiencies. Furthermore, since there is no provision under the Act by which Respondents can recoup revenues returned to the purchaser even if they are later found to be justly entitled to them, the effect of the Commission's refund order is not only to forever deny Respondents the right to a just and reasonable rate for at least seven years, but to impose confiscatory rates for seven or more years in violation of Respondents' constitutional rights and privileges.

B. A Condition Requiring The Refund of Amounts Collected Under a Just and Reasonable Rate Is Not Only Not Reasonable But Is In Direct Conflict with the Natural Gas Act.

Section 4(a) of the Act requires all rates to be just and reasonable and any rate that is not just and reasonable is unlawful. All Petitioners would agree that there is no other way under the Act to determine the justness and reasonableness of any rate without receiving and evaluating cost and economic evidence. Thus, it would be in direct conflict with the Act to require refunds if the rate level was just and reasonable. Therefore, a condition requiring Respondents to refund any amount collected from prices which are below the just and reasonable rate level would not only be unreasonable but absurd.

Since Congress did not give the Commission power under Section 7 to suspend rates[28] nor to fix rates[29], the only basis for requiring a refund under a Section 7(e) condition, which is the basis of the Commission's order, is found in the last sentence of Section 7(e) which provides:

> "* * * The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder *such reasonable terms and conditions as the public convenience and necessity may require.*" (Emphasis added)

What is reasonable? Obviously it would be unreasonable to impose a condition requiring Respondents:

(1) to refund any portion of a just and reasonable rate,

(2) to serve consumers at a confiscatory rate; or

(3) to sell gas at an unlawful rate.

It would also be unreasonable to impose conditions which would preclude the Commission for at least one third of the contract term from determining whether a rate is confiscatory, just and reasonable, or otherwise lawful.

In *CATCO*, the authority relied upon for the "in-line" doctrine, this Court held that the gas operator may:

> "unless bound by contract, *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 1956, 350 U.S. 332, 76 S.Ct. 373, 100 L.Ed. 373, file new rate schedules with the Commission. This rate becomes effective upon its filing, subject to the 5-month suspension * * * This not only gives the natural gas company opportunity to increase its rates where justified but likewise

[28] *Atlantic Refining Co. v. Public Service Commission of New York*, 360 U.S. 378 (1959)

[29] *United Gas Pipeline Co. v. Mobile Gas Service Corp.*, 350 US. 332 (1956).

guarantees that the consumer may recover refunds for moneys paid under excessive increases." (360 U.S. at page 389)

Section 4(d) of the Act prevents Respondents from filing rate increases retroactive to the date of original certification as was contemplated by this Court in *CATCO*. To prevent detriment to the consumer in case the rates collected were excessive and to avoid irreparable harm to the producer in case the reduced rates were below a just and reasonable level, the court below ruled that Respondents must refund all amounts collected above the just and reasonable level determined in accordance with Sections 4 and 5 of the Act. What could be fairer or more just?

III.

THE COURT BELOW WAS CORRECT IN HOLDING THAT THE COMMISSION DOES NOT HAVE THE POWER UNDER SECTION 7(e) OF THE ACT TO SUSPEND RATES UNDER THE GUISE OF THE MORATORIUM.

Based upon the rationale of this Court's decision in *Hunt*[40] and the well established principle that rate making powers are vested solely in natural gas companies, *Mobile*,[41] the court below held that the Commission erred in imposing an additional four-year moratorium as a condition to the reissuance of permanent certificates in this case. The Petitioners in attacking this holding argue that this Court in

[40] *Federal Power Commission v. H. L. Hunt*, 376 U.S. 515 (1964).

[41] *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956).

Hunt approved similar moratoriums as a condition to the issuance of temporary certificates and that the same justification exists in the issuance of permanent certificates. Petitioners further contend that this extension of this Court's decision in *Hunt* to permanent certificates is supported by this Court's later decision in *Texaco.*[42] A careful analysis of these decisions in the light of the facts of this case will, however, rather than support the Commission's moratorium, emphasize and dramatize its unlawfulness and illegality.

First, lest there be any confusion over semantics, the present "moratorium" is simply a means of suspending Respondents' contract prices for an additional four-year period (1963-1967).[43] Call it "moratorium" or any other name, the 'suspension' effect cannot be camouflaged. Such a condition cannot be confused with the conditions involved in *Hunt* and *Texaco,* which were proscriptions on the filing of price increases as a condition to the entry of gas in the interstate market. Here, as has been stated, the subject gas had been flowing in interstate commerce for in excess of five years before the imposition. As a substantive and practical matter,

[42] *Federal Power Commission v. Texaco, Inc.,* 337 U.S. 33, (1964).

[43] Black's Law Dictionary, Fourth Edition, 1951, defines moratorium as:

> "A term designating a suspension of all, or of certain, legal remedies against debtors, sometimes authorized by law during times of financial distress."

Similarly, Webster's New International Dictionary of the English Language, Second Edition, Unabridged, defines moratorium as:

> "A period of permissive or obligatory delay; specif., *Law,* a period during which an obligor has a legal right to delay meeting an obligation, eps. such a period granted to an emergency, as to a bank or debtors generally, by a moratory law."

the Commission's order, by means of its retroactive refund requirement and future moratorium provision, suspended for almost ten years the effectiveness of the contract price schedule, without at any time during this interim affording Respondents an opportunity to justify their contract prices. No authority can be found in the Act or elsewhere for such action.

The only statutory authority for suspending rates is found in Section 4(e) of the Act. However, this power was restricted by Congress as to both time (five months) and purpose (to review and determine the lawfulness of the rates proposed). Significantly, Congress did not authorize even in Section 4 such broad suspension powers as the Commission here proposes to exercise.[11] Likewise significant is the fact that limited though the suspension power may be, Congress did not grant any suspension power under Section 7(e) of the Act. In exhorting the Commission to properly exercise its conditioning powers under Section 7 in prescribing the conditions under which gas may enter the market, this Court has emphasized the lack of suspension power under Section 7. In *CATCO* the court stated:

> "Moreover the fact that *the Commission was not given the power to suspend initial rates under Section 7 makes it the more important.*" (360 U.S. at page 390) (Emphasis added)

[11] In fact, Congress has refused to extend the suspension period. In 1962 the Commission recommended to Congress that the Section 4 suspension period be extended for a further period not exceeding three months beyond the statutory five month period. See Forty-Second Annual Report of the Federal Power Commission, Fiscal Year Ended June 30, 1962, Page 16. This recommendation was not adopted.

Similarly in *Hunt*:

> "Nor does Section 7 grant the Commission power to suspend the rate authorized in permanent or temporary certificates issued under that section. Once a permanent certificate is granted the Commission can correct an improper rate only under Section 5 of the Act, 52 Stat 823, 15 USC Section 717 d, which likewise has no suspension provision." (376 U.S. at page 521)

As the court below held, the correctness of its holding that the Commission is without power to suspend Respondents' contract prices is demonstrated by the facts of this record:

> "For applications filed in 1958, the Commission asserts the power to compel the producer to sell gas for nearly ten years at a price substantially less than the opening contract price and without the opportunity of being able to ever seek and obtain the automatic stepped up price increases provided for in the contract. Thus, for nearly half of the twenty-year contract period through the guise of a 'price' condition, the Commission obtains an irrevocable dedication of the gas to interstate sale and an effectual denial of any opportunity for the producer to exercise the legislative right to file, subject to suspension and refund, contractual rate increases. If the Commission may do it for half of the period, there is no reason why it may not do so for all. Congress could hardly have intended to delegate the power of legislative repeal by any such easy route." (R. 635)

This is, of course, in accord with the well established judicial principle that rate making powers are vested solely in the natural gas companies, and that the power granted the Commission "is simply the power to review rates and contracts made in the first instance by natural gas companies and, if they are determined to be unlawful, to remedy them." *Mobile* (350 U.S. at page 341). The right of a natural gas company to make rate increase filings consistent

with its contract has been consistently upheld and assumed in reviewing the Commission's conditioning authority.[45]

Of course, disregarding *arguendo* the peculiar facts of the present case, this Court in *Hunt* discussed in some detail the interplay of Sections 4 and 7 of the Act. In emphasizing the power of the Commission to lay down conditions precedent to the entry of gas into interstate commerce (i.e., temporary certificates), this Court explicitly specified the point at which the filing privileges of Section 4 become applicable.

> "Under the procedures of the Act, it is at the point of *permanent or unconditional temporary certification* that the provisions of Section 4 become applicable. The gas has been permanently certificated into interstate commerce and the independent producer is then free to pursue the rate filing procedure of that section." (Emphasis added) (376 U.S. at page 523)

Further, in upholding the temporary moratorium as a condition to the issuance of *ex parte* temporary certificates, this Court specifically said:

> "In view of the ex parte nature of the proceeding it appears only fair to all concerned that the condition upon which the rate was temporarily certificated be continued unchanged until the permanent certificate is issued." (376 U.S. at page 523)

Thus, it is clear that a price increase proscription is not proper in a permanent certification, even in the normal, ordinary case, for at that point Section 4 of the Act has exclusive control over the changing of the filed rate schedule.

[45] *Willmut Gas and Oil Co. v. Federal Power Commission, et al.*, 294 F. 2d 245 (D.C. Cir. 1961); *Texaco, Inc., et al., v. Federal Power Commission*, 290 F. 2d 149 (5th Cir. 1961); *Atlantic Refining Co. v. Federal Power Commission, et al.*, 316 F. 2d 677 (D.C. Cir. 1963); *California Oil Co., Western Div. v. Federal Power Commission*, 315 F. 2d 652 (10th Cir. 1963).

However, regardless of the right to impose such conditions in the normal, ordinary case, such conditions are clearly improper in this case where the permanent certificates were issued in 1958 and 1959 and were never vacated (R. 395) and the imposition first appears in 1963. It takes a great deal of imagination to call the present conditions an exercise of "rate review" and not "rate making" when it simply perpetrates for another four years the price freeze which has been imposed for the preceding five years due to the refund requirement condition.

Petitioners argue that the necessity for the moratorium is to prevent triggering of other prices in the area. The lack of necessity for the imposition of the moratorium is clearly evidenced by the facts of this case. Respondents Placid and Hill are now collecting, pursuant to Section 4, 25.55¢ per Mcf from two of the very sales here involved! The 25.55¢ sales prices have been effective since December 1, 1962.[48] Moreover, Respondent Sands has been collecting for the sale it has involved, 24.55¢ per Mcf since May 1, 1964. Significantly, this increase was filed and made effective as a result of a stay granted by the court below. However, not one increase has been "triggered" by the filing and collection of these contractually authorized prices. Even more significant is the fact that after a full hearing under Section 4(e) concerning the lawfulness of the 24.55¢ price, the Examiner's decision, still pending before the Commission, held such in-

[48] These price increases were filed in accordance with the price provisions of their respective contracts. The Commission after a full hearing disallowed the increases in Opinion No. 369, 28 FPC 897. Its action in so doing was, however, subsequently reversed in *Hill, Trustee v. Federal Power Commission*, 335 F. 2d 355 (5th Cir. 1964).

creased price to be "just and reasonable."[47] Be it remembered that just and reasonable prices are the ultimate goal of the Act.

Thus, as the court below recognized, the Commission's moratorium order cannot be sustained because (1) it, as a practical matter, is a suspension order which is beyond the Commission's authority under the Act, and further (2) it unlawfully invades the field of rate making which according to this Court is controlled by Section 4 of the Act at and subsequent to issuance of permanent certificates, and finally, (3) there is no need for a moratory in the present case, since the Commission's fears of "triggering" were unfounded.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the decision of the court below be affirmed.

Respectfully submitted,

ROBERT W. HENDERSON,
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September 29, 1965

[47] This finding by the Examiner illustrates the injury which Respondents will suffer if the proscribed rate levels are ultimately found to be just and reasonable. No remedy exists for them to recoup the revenues authorized by contract which they will have lost during the so-called moratorium period. *Sohio Petroleum Co. v. Federal Power Commission*, 298 F. 2d 465 (10th Cir. 1961). Such injury is much more irreparable than any defects that may exist in the suspension and refund procedures provided for in Section 4 of the Act.

APPENDIX A

Sept. 10, 1965

In reply refer to:
BNG-IP/GC
Docket No. G-19437
Continental Oil Company

Continental Oil Company
P. O. Box 2197
Houston, Texas 77001

AIRMAIL

Attention: Mr. Fred T. O'Leary

Gentlemen:

Based upon the allegations presented in the statement to invoke Section 157.28 of the Commission's Regulations filed in the application to amend the certificate issued in Docket No. G-19437, the Commission finds that an emergency exists within the meaning of the Natural Gas Act, and a temporary certificate is hereby issued to Continental Oil Company in this proceeding pursuant to Section 7 of the Act to sell gas to Southern Natural Gas Company from additional acreage in the Bayou Long Field, Iberia Parish, Louisiana.

This temporary certificate is issued subject to the following express conditions:

(1) The total initial price for such service shall be 21.25¢ per Mcf at 15.025 psia subject to Continental Oil Company refunding to Southern Natural Gas Company from the date of initial delivery, with interest at 7% per annum, any amounts collected in excess of the amounts resulting from the rate finally determined to be required by the public convenience and necessity in Docket No. G-19437, as amended. Refunds shall not be required below a total rate of 20.0¢ per Mcf at 15.025 psia, inclusive of any tax reimbursement.

(2) The above price shall remain in effect until changed by Commission order in this proceeding, Docket No. G-19437.

(3) The filing within 30 days hereof of a supplement to the rate schedule consistent with the price in (1) above and a billing statement reflecting such initial price.

(4) The temporary certificate with conditions attached shall be accepted as issued within 30 days herefrom by written acceptance made by a responsible official of the company (original and five copies). If reconsideration of such temporary certificate is sought, service hereunder shall not be commenced. If service is commenced under this temporary certificate, the conditions attached shall become effective and service may not be discontinued without permission of the Commission issued pursuant to the provisions of the Natural Gas Act.

The related proposed rate schedule supplements will be considered accepted for filing upon compliance with the above conditions to be effective on the date of initial delivery, subject to the provisions of Sections 154.94(c) and 154.101 of the Commission's Regulations under the Natural Gas Act.

The rate schedule supplements have been designated as follows:

Description		*Designation*
Letter Agreement	12-1-64	Supplement No. 11 and
Letter Agreement	6-3-65	Supplement No. 12 to Continental Oil Company FPC Gas Rate Schedule No. 172

Please advise the Commission of the date of commencement of deliveries under such rate schedule supplements, making reference in your communication to the rate schedule supplements designated above.

This temporary certificate and the acceptance of the above rate schedule supplements are without prejudice to such

final disposition of the application to amend the certificate as the record may require.

Please advise the Commission as to whether your company would be willing to accept a permanent certificate for sales from the additional acreage at a rate of 20.0¢ per Mcf at 15.025 psia, inclusive of any applicable tax reimbursement. Such acceptance may permit disposition of the subject application to amend after a statutory hearing held before the Commission without further notice provided no protests in opposition to such application to amend remain on file. Under such procedure, unless otherwise advised, you need not appear nor be represented at the hearing.

If services are not commenced within 90 days from the date of this temporary certificate, it shall be void and of no effect.

By direction of the Commission.

Secretary

cc: Southern Natural Gas Company
P. O. Box 1513
Houston, Texas 77001

FILED
OCT 1 1965
JOHN F. DAVIS, CLE

Nos. 21, 22, 32

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

THE UNITED GAS IMPROVEMENT COMPANY, ET AL., *Petitioners,*

v.

CALLERY PROPERTIES, INC., ET AL., *Respondents.*

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, *Petitioner,*

v.

CALLERY PROPERTIES, INC., ET AL., *Respondents.*

FEDERAL POWER COMMISSION, *Petitioner,*

v.

CALLERY PROPERTIES, INC., ET AL., *Respondents.*

On Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENT, CALLERY PROPERTIES, INC.

RICHARD F. GENERELLY
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October 1, 1965

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BRIEF FOR RESPONDENT, CALLERY PROPERTIES, INC.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit (R. 620-642) is reported at 335 F. 2d 1004. The opinions of the Federal Power Commission, Opinions Nos. 398 (R. 549) and 398-A (R. 606), are reported at 30 F.P.C. 283 and 682.

JURISDICTION

The judgment of the court of appeals reversing the Commission's order and remanding the proceedings was entered on August 14, 1964 (R. 643). Orders were entered granting the petitions for writs of certiorari in Nos. 21, 22 and 32 on March 8, 1965 (R. 645-647). 380 U.S. 931. The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. § 717r(b).

QUESTIONS PRESENTED

1. Whether the court of appeals was correct in holding that, while the Commission need not convert a producer certificate hearing under Section 7(e) of the Natural Gas Act into a full-blown rate case, the Commission is under a duty to hear and evaluate all relevant evidence bearing on the present and future public convenience and necessity when it is urged, or held, that a producer's proposed price is out of line.

2. Whether the court of appeals was correct in holding that the Commission may not properly condition the grant of a permanent certificate under Section 7 of the Natural Gas Act upon a requirement that the applicant thereafter waive the rate filing procedures reserved to natural gas companies under Section 4 of the Act.

3. Whether the Commission has authority under Section 7(e) of the Natural Gas Act to require an applicant to refund amounts previously collected pursuant to unconditional permanent certificates.

4. Whether, assuming *arguendo* that the Commission had the power to reduce rates retroactively and to order refunds in the unique circumstances of the in-

stant case, the court below was correct in holding (a) that the producers were entitled to just and reasonable rates under the Natural Gas Act, and (b) that a balancing of the equities required that refunds not be ordered pending a determination of the justness and reasonableness of the contract rates collected by the producers over a period of years under unconditional permanent certificates.

STATUTE INVOLVED

Pertinent provisions of the Natural Gas Act (Sections 4, 5, 7(c) and (e), and 19(b), 52 Stat. 821, as amended, 15 U.S.C. §§ 717-717w) are set out in appendices to the briefs for Petitioners in Nos. 21, 22 and 32. Section 19(c) of the Natural Gas Act provides:

> "Sec. 19(c). The filing of an application for rehearing under subsection (a) shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order." [52 Stat. 831 (1938); 15 U.S.C. § 717r]

STATEMENT

Respondent Callery Properties, Inc., is a nominee corporation engaged in the business of selling natural gas and oil produced from various fields in the States of Louisiana and Texas.[1] A substantial portion of the gas which it sells is resold by pipelines in interstat-

[1] Callery is one of three related entities engaged in the business of exploring for and developing oil and gas reserves on behalf of individual investor-participants. As agent for approximately 300 individuals, estates, trusts and corporations for whom it holds record title in producing properties, Callery owns none of the gas which it sells (R. 326-327).

commerce and Callery is therefore subject to regulation by the Federal Power Commission as a "natural-gas company" under the Natural Gas Act.

In December 1958 Callery filed two applications with the Commission for certificate authority under Section 7 of the Act covering proposed sales of gas to Hope Natural Gas Company from fields in Acadia and Iberia Parishes, Louisiana. The initial contract price in each case was 21.5 cents per Mcf, plus 2.05 cents per Mcf tax reimbursement. A hearing was held on Callery's applications in conjunction with related pipeline and producer applications, and on August 10, 1959 the Commission issued its Opinion No. 327, 22 F.P.C. 378 (R. 116) granting Callery and other producers permanent unconditioned certificates of public convenience and necessity in accordance with their applications.

The Public Service Commission of New York sought rehearing of Opinion No. 327 and later judicial review on the ground that Callery and the other producers had failed to demonstrate why their sales were required by the public convenience and necessity at prices higher than those which prevailed in Southern Louisiana prior to the Court's decision in *Atlantic Refining Co.* v. *Public Service Commission of New York,* 360 U.S. 378 (*"Catco"*) (R. 144).[2] Basing its decision on *Catco,* the Court of Appeals for the District of Columbia reversed Opinion No. 327 and remanded the case to the

[2] While urging that the certificates of the producers be conditioned at a price no higher than that demonstrated by the record to be in the public convenience and necessity, the New York Commission did not seek a stay of the certificate authority granted as it might have done under Section 19(c) of the Act. Being under a dual obligation to the pipeline purchaser and to royalty owners to commence production at the earliest date, Callery began deliveries of gas to Hope in December 1959.

Commission for further proceedings in which the producer applicants might, if they so chose, "either augment the record so as to support a certification without price condition, or seek a certification appropriately conditioned." *Public Service Commission of New York* v. *Federal Power Commission*, 287 F. 2d 146, 150 (D.C. Cir. 1961).

On May 10, 1961 the Commission moved to carry out the judgment of the D.C. Circuit by consolidating the remanded proceedings involving Callery's sales with the area rate proceeding instituted on that date in Docket No. AR61-2 "to determine the rate, or rates, at which the public convenience and necessity requires, and a just and reasonable rate, or rates, for sales of natural gas" in Southern Louisiana, 25 F.P.C. 942, 944. Eight months later, without a hearing having been held in either the Southern Louisiana area proceeding or in Callery's remanded dockets, the Commission issued an order on January 10, 1962 advising Callery for the first time that the Commission might later require as a condition of amended certificate authorization that Callery refund revenues received from Hope from the date of first delivery of gas (R. 395).[3] Thereafter, on March 7, 1962, Callery's two dockets

[3] Under its agency agreement with the owners of the gas which it sells, Callery is legally bound to distribute all income when received and may not withhold income from a current owner save in those instances where it has received prior notice of a potential refund liability. Since the ownership in the properties involved had changed radically in the period following the commencement of deliveries of gas to Hope and many of the original owners and recipients of income were no longer available, Callery sought review of the Commission's January 10, 1962 order. Its petition for review was dismissed by the Fifth Circuit without prejudice. *Callery Properties, Inc.* v. *Federal Power Commission*, 5th Cir. No. 19563 (September 20, 1963).

were severed from the Southern Louisiana proceeding and consolidated with other remanded dockets for separate hearing and disposition, 27 F.P.C. 482 (R. 409).

In the hearing that followed, which lasted four days and in the course of which virtually all evidence offered by Callery and the other producers in support of their initial contract prices was excluded as irrelevant, the presiding examiner ruled that the sole criterion for determining the initial price at which the producers' sales would serve the public convenience and necessity was the general price level prevailing in Southern Louisiana in 1957 and 1958 under contracts free from the infirmities which led the courts to reverse the Commission's original unconditional certifications. On December 7, 1962 the examiner issued a decision in which he determined the "in line" price for gas sold in Southern Louisiana under 1957 and 1958 contracts to be 20.0 cents per Mcf, including tax reimbursement of 1.5 cents per Mcf, and ordered Callery and the other producers to refund to their respective purchasers all amounts collected in excess of a base price of 18.5 cents from the date of initial delivery of gas (R. 490).

On July 17, 1963, by Opinion No. 398 and order issued in *Placid Oil Company, et al.*, 30 F.P.C. 283 (R. 549), the Commission affirmed the examiner's decision in all material respects. The examiner's conclusion that economic and cost evidence were irrelevant to the determination of a proper "in line" price was affirmed in particular, as was his finding that the producers be required to refund amounts previously collected under unconditional permanent certificates. In addition to the other requirements of the examiner's order, which the producers were given no option to

reject, the Commission added a further condition imposing a moratorium on all rate increase filings in excess of 23.55 cents per Mcf, including tax reimbursement, until July 1, 1967, or the final decision in the Southern Louisiana area rate proceeding, whichever is earlier (R. 582).

On review of Opinion No. 398, the court below held that the Commission erred in three respects. The court found first that the Commission had failed in its statutory duty to determine the present and future public convenience and necessity when it restricted the scope of its inquiry in the remanded proceedings to preexisting prices in Southern Louisiana. While agreeing that the question of whether a producer's proposed price is in line or not is an important and sometimes decisive factor in the certification of his sale, the court held that factors other than price exist which must be taken into consideration and that when, as in this case, it is urged and held that the proposed price is out of line, the Commission is under a duty to hear and evaluate all relevant evidence bearing on the public convenience and necessity.

Secondly, the court held that the moratorium on rate filings, imposed as a condition of permanent certification, was unlawful and tantamount to the Commission's repeal of a right reserved to natural gas companies by Congress under Section 4(d) of the Act. Finally, while upholding in the unique circumstances of the case the Commission's power to require refunds, the court held that the proper measure of refund liability should be the difference, if any, between the contract price and a just and reasonable rate determined after appropriate hearing under Sections 4 and 5 of the Act.

SUMMARY OF ARGUMENT

I.

In *Catco,* the Court found that, while rates were not the only factor bearing on the public convenience and necessity, the issue of price was in that case and is generally a consideration of prime importance in the issuance of producer certificates. Noting that in the absence of a certificate condition lowering the initial rate any adjustment in price as a result of a subsequent determination of a just and reasonable rate under Section 5 of the Act would be prospective only, the Court admonished the Commission to make use of its conditioning power under Section 7 of the Act whenever the application of the producer signaled on its face or on the presentation of evidence a situation which would probably not be in the public interest. The Commission was reminded at the same time of its statutory duty under Section 7(e) to weigh and evaluate all factors bearing on the public convenience and necessity at the time of permanent certification.

This case involves the Commission's effort to evolve an effective program of producer regulation built around the first admonition of *Catco* without reference to the second. It arises in the unique context of producer sales begun in 1959 under permanent unconditioned certificates later vacated by the courts in the light of *Catco* for precisely the reason which led to the reversal in *Catco, i.e.,* the failure of the producer applicants to show the "reason why" their sales of gas were required by the present or future public convenience and necessity at prices higher than the weighted average of prices prevailing in the producing area at the time of certification. On remand, the producer Respondents,

proceeding in the total absence of any evidentiary standard of proof from the Commission, sought to show by a wide variety of cost and economic data why their sales were required by the public convenience and necessity at prices which might otherwise be considered out of line. This evidence was rejected in its entirety on a finding that the only relevant factor to be considered in determining whether the public convenience and necessity will be served by the issuance of a permanent producer certificate under Section 7(e) is price, and that price must be free from the "infirmities" which led the Court to reverse the Commission's order in *Catco*.

On review, the court of appeals found that price, while undeniably important, was not "the whole thing" and that the Commission had failed in its duty under Section 7(e) to determine the "present or future public convenience and necessity" when it restricted its whole inquiry to previously certificated prices in Southern Louisiana.

We believe that the decision below was in complete accord with the statute and this Court's interpretation of the Commission's duties thereunder in *Catco* and other cases. The fears expressed by the Commission and the other Petitioners that the decision of the court below will result in a flood of evidence in producer certificate cases of such proportions as to frustrate and render producer regulation ineffective are groundless. In the present climate of producer regulation, where virtually all new gas sales are proposed and permanently certificated at the Commission's guideline prices, the number of contested or full evidentiary hearings would be minimal. Moreover, while holding that the evidence rejected by the Com-

mission in the instant case obviously bore on the public convenience and necessity, the court below did not purport to determine what evidence would or would not be sufficient to establish the "reason why" an out of line price might be required by the public interest. Instead, the court indicated the obvious solution, which Petitioners have chosen to ignore, namely, the formulation of basic evidentiary standards.

II.

The Commission's contention that it must be given the right to declare a moratorium on rate increase filings by producers under Section 4(d) as a condition of permanent certification pending the determination of just and reasonable rates is in conflict with the scheme of the Act and was properly rejected by the court below. The producer's one remedy to protect himself from being required to sell his gas at less than a just and reasonable rate lies in the right reserved to natural gas companies by Congress to propose changes in their rates under Section 4(d) where permitted by contract. That right was specifically recognized by the Court in *Catco* and *Sunray*.

III.

While Callery does not agree with the decision of court of appeals insofar as it affirms the right of the Commission to require refunds in the circumstances of the instant case, the further holding that refunds should not be ordered pending a determination of the justness and reasonableness of Callery's contract price is eminently correct in its recognition of the equities involved. Should Callery be required to refund amounts previously collected based on an "in line"

price and should it later be determined that the contract price was just and reasonable, Callery would have no way of recovering the difference between the "in line" price and the just and reasonable rate to which its owners were entitled.

ARGUMENT

Introduction

This case presents for the Court's consideration, as the Commission points out (FPC Br., p. 7), two aspects of the regulatory program devised by the Commission in response to the Court's admonition in *Catco*[4] that it exercise its conditioning power under Section 7 of the Natural Gas Act to afford adequate rate protection to the public during the extensive period of time required to determine just and reasonable rates. Under this program, which went into effect following *Catco,* the Commission has undertaken to condition the price at which all new gas enters the market at a so-called "in line" level based on previously certificated prices in the producing area. All evidence other than that relating to the level of prices under "non-suspect" or "clean" certificates, *i.e.,* those not subject to the infirmities which led to the reversal in *Catco,* is excluded as irrelevant. More recently, the Commission's program for producer regulation has involved the proscription of rate increase filings under Section 4(d) of the Act above an "anti-triggering" level pending the determination of just and reasonable rates.

The Commission and Petitioners aligned with the Commission attack the decision of the court below pri-

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[4] *Atlantic Refining Co.* v. *Public Service Commission of New York,* 360 U.S. 378 (1954).

marily on grounds of administrative convenience. They contend first that, if permitted to stand, the decision below will necessarily mean that certificate proceedings under Section 7 will hereafter become "bogged down by the consideration of evidence even more voluminous than would be relevant in rate proceeding" (FPC Br., p. 9). Secondly, they argue that the Commission must be given the right to freeze producer rates until such time as just and reasonable rates are determined under Sections 4 and 5 of the Act; otherwise, it is contended, widespread triggering may occur which could disrupt the existing rate structure to the detriment of the consuming public. Finally, while supporting the holding that Callery and the other producer Respondents may be required to refund amounts previously collected under their unconditional certificates, Petitioners and the Commission object to the use of the statutory standard of justness and reasonableness as a proper measure of refund liability. In Petitioners' view, Respondents were not entitled to a just and reasonable rate during the period of their unconditional certification but only to an "in line" price.[5]

In light of the arguments raised by Petitioners, it is important at the outset that this case be viewed in its proper setting and, more important, that note be taken of what the court below decided and what it did not decide. The proceedings before the Commission which resulted in Opinion No. 398 did not involve an

[5] Petitioners' present position with respect to the refund issue is at variance with what would appear to have been their position prior to the issuance of Opinion No. 398 in the remanded proceedings. See, concurring and dissenting opinion of Commissioner O'Connor, Opinion No. 398, issued July 17, 1963 (R. 588).

"initial" certification in the usual sense of the word, nor did they involve a situation wherein temporary sales authority had been granted subject to price or refund condition. Prior to the vacation of their original certificates, Callery and the other producers had sold their gas under valid, subsisting permanent certificates which had not been stayed and which were legally effective and binding. In each instance, the original certification was set aside for the failure of the producer to show the "reason why" his sale was required by the public convenience and necessity at the price proposed. On remand, the Commission declined to receive evidence offered by the producers designed to show the "reason why."

In answer to Petitioners' arguments, we will show that the court of appeals below properly held that the Commission had failed in its statutory duty under Section 7(e) of the Act to determine the "present or future public convenience and necessity" when it limited the entire scope of its inquiry to previously certificated prices in the Southern Louisiana area; that the decision below is fully in accord with *Catco* and the decisions of the remanding courts; and that, contrary to Petitioners' dire predictions, the court's holding will in no way frustrate or impede effective producer regulation. We will likewise show that the moratorium placed on the filing of otherwise authorized rate increases under Section 4(d) of the Act cannot be justified as a stopgap measure and is, moreover, in basic conflict with the scheme of the Act as interpreted by this Court in *Catco* and other cases.

Finally, we will show that whereas Callery disagrees with lower court's holding with respect to the Commis-

sion's inherent power to require refunds in this case, its further holding that refunds should not be ordered pending a determination of the justness and reasonableness of the contract prices is eminently correct in the unique circumstances of this case.

I. THE COURT OF APPEALS CORRECTLY CONSTRUED THE COMMISSION'S STATUTORY DUTY UNDER SECTION 7 (e) OF THE ACT IN LIGHT OF CATCO AND OTHER CASES

While holding that the Commission need not convert a producer certificate hearing under Section 7(e) of the Act into a rate case as a prerequisite to the issuance of the requested authorization, the court of appeals did hold that the Commission has a clear duty to hear and evaluate all relevant evidence bearing on the present and future public convenience and necessity when it is urged or held, as it was in each of the remanded proceedings in this case, that a producer's proposed price is out of line. The court's holding is in complete accord with and fully supported by the Court's decision in *Catco.*

In *Catco,* in addition to admonishing the Commission to make proper use of its conditioning power under Section 7 where the application on its face or on presentation of evidence signals the existence of a situation that probably would not be in the public interest, the Court further admonished the Commission as to its duty in determining the public convenience and necessity. The Court expounded that duty in the following language:

> "* * * Nor do we hold that a 'just and reasonable' rate hearing is a prerequisite to the issuance of producer certificates. What we do say is that the inordinate delay presently existing in the process-

> ing of § 5 proceedings requires a most careful scrutiny and responsible reaction to initial price proposals of producers under § 7. Their proposals must be supported by evidence showing their necessity to 'the present or future public convenience and necessity' before permanent certificates are issued. This is not to say that rates are the only factor bearing on the public convenience and necessity, *for § 7(e) requires the Commission to evaluate all factors bearing on the public interest.* * * *" (360 U.S. at 391) (Emphasis supplied).

In its subsequent decision in *Federal Power Commission* v. *Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1 (1961), the Court emphasized that "*all*" factors bearing on the public interest must be considered (365 U.S. at 8), and took note of its previous statements that the term "public convenience and necessity" connotes a "flexible balancing process, in the course of which all the factors are weighed prior to final determination" (365 U.S. at 23).

A. The Decision Below Was Fully in Accord With the Decisions of the Remanding Circuits

Not only was the lower court's holding in accord with the Court's decisions in *Catco* and *Transco, supra,* but it likewise was fully consistent with the decisions of the other remanding circuits. Thus, the Ninth Circuit in *United Gas Improvement Co.* v. *Federal Power Commission,* 283 F. 2d 817, 821 (1960), specifically pointed out that circumstances such as increased production costs might well justify unconditional permanent certification of a producer's sale at a price higher than a previous line of prices because of public interest requirements. The Tenth Circuit likewise found that:

> "Public convenience and necessity may require certificating a sale when the price is 'out of line'." *United Gas Improvement Co.* v. *Federal Power Commission,* 287 F. 2d 159, 163 (1961).

The Commission's order was reversed by the Fifth Circuit in *United Gas Improvement Co.* v. *Federal Power Commission,* 290 F. 2d 147 (1961), for lack of evidentiary support on a finding that "too little" consideration had been given to what might ultimately be a just and reasonable rate (290 F. 2d at 148).

It thus seems clear that, in the circumstances of the instant case, consistent with its duty under Section 7(e) of the Act to determine the present or future and not the past convenience and necessity, the Commission was required on remand to re-examine and evaluate all aspects of the producers' sales, including the initial price issue, in light of current conditions in the industry. As previously noted, the case below did not involve "initial" certification and that fact alone is sufficient to resolve the claimed conflict with the D.C. Circuit's decision in *Public Service Commission of New York* v. *Federal Power Commission,* 329 F. 2d 242 (1964) (*"Skelly"*). Indeed, when the two cases are viewed in proper perspective and context, the claimed conflict between the decision below and the D.C. Circuit's decision in *Skelly* plainly does not exist.

Unlike *Skelly* and the other decisions relied upon by Petitioners (FPC Br., pp. 27, 33), which involved *initial* certifications, the case below was unique in that it involved the residuum of a large number of permanent certifications which had been remanded to the Commission in the light of *Catco* for the failure of the producers to show the "reason why" their sales were required by the public convenience and necessity at

prices which would otherwise be considered out of line. By the time the Commission issued its decision in the remanded proceedings in July 1963, most of the producer's sales were ancient history in the sense that known changes in the national economy had occurred in the period following their initial certification. Under the circumstances, consistent with its duty under Section 7(e), the Commission was under a duty to re-examine all facets of the public interest in the light of the current conditions then prevailing.

The Fifth Circuit's ruling that it do so in this case and that it not restrict its inquiry solely to the "in line" price in prior years was nowise inconsistent or in conflict with the D.C. Circuit's endorsement of the Commission's "in line" determination. As the court below noted (R. 632), the evidence proffered and rejected in *Skelly* was of a much more limited nature and, while holding that consideration of the proffered evidence was not essential to the initial certification in that case, Judge Fahy was careful to point out that:

> "* * * In so deciding we need not hold that the Commission may never consider such evidence if the circumstances in a particular case move it to do so consistently with its obligations under *Catco* (329 F. 2d at 247).

Bearing in mind that it was the Commission's failure to carry out its obligations under *Catco* that prompted the same panel of the D.C. Circuit to reverse and remand Opinion No. 327 for further proceedings to permit Callery and the other producers either to "augment the record" or to seek "appropriately conditioned" certificates (287 F. 2d 146, 150), it is illogical to assume that any real conflict exists between the court's subsequent decision in *Skelly* and the holding

below. In remanding Opinion No. 327 to the Commission with instructions to "augment the record," the D.C. Circuit obviously contemplated a hearing in which the producers would be afforded the opportunity of showing by substantial evidence the "reason why" their sales were required at the prices proposed in their contracts. Such a showing was obviously impossible when the Commission summarily excluded as irrelevant all evidence other than that relating to previously certificated prices in the area.

B. The Decision Below Will Not Frustrate Effective Regulation of Producers

Petitioners express the fear that the holding below will hereafter turn every producer certificate case under Section 7 into a "full-blown rate case." They unanimously predict that, if allowed to stand, the Fifth Circuit's decision will open the floodgates overnight to a deluge of cost and economic evidence more appropriate to a rate proceeding under Section 4 or 5 of the Act, thereby seriously impairing the Commission's current program for achieving effective producer regulation. Petitioners' fears in this regard are exaggerated, to say the least.

In the first place, the vast majority of new gas sales contracts being entered into today are not only in the form prescribed by the Commission's rules but at the prices prescribed for the particular producing area shown in the Commission's Statement of General Policy No. 61-1, 18 C.F.R. § 2.56. Under the streamlined certificating procedures now in effect, literally hundreds of new sales have been and will continue to be permanently certificated at the Policy Statement

"guideline" prices in record time.* In those few cases where the proposed initial price exceeds the Commission's guideline price, or where it is urged by an intervenor that the initial price is out of line, the producer may request temporary authorization subject to such conditions as the Commission may attach or accept permanent certification at a lower price. It necessarily follows that in the present climate of producer regulation the number of cases in which the Commission would be required to hear and evaluate evidence proffered by the applicant in support of an out of line price would be relatively few.

Beyond that, and more important, the court below did not purport to indicate either the quantum or the nature of the proof required to sustain the certification of a sale at a higher than "in line" or out of line initial price. While indicating that the economic and cost evidence excluded by the Commission was clearly germane and relevant in that it bore on broad questions of public convenience and necessity, the court recognized the administrative burden involved and the necessity for expedition in the discharge of the Commission's duties and responsibilities under the Act. The Court therefore pointed to a specific, workable solution, which the Commission and Petitioners have chosen to ignore, i.e., that the Commission avoid the delays which would necessarily attend the trial of a full-scale rate case by announcing the types of evidence deemed relevant and the nature of the proof

* On February 26, 1964, the Commission announced that during the first 6½ months of experience under its new procedure for handling producer certifications it disposed of 806 filings in an average time of 42.3 days for each item, compared with approximately 100 days under the old process. See FPC Press Release No. 13156, issued February 26, 1964.

required to support certification at an initial price deemed or urged to be out of line (R. 632, n. 31).

The Commission's Rules under the Natural Gas Act, 18 C.F.R. §§ 157.5-157.22, are specific and detailed in their requirements as to exhibit material which must accompany pipeline certificate applications under Section 7 of the Act. Based on the information supplied by the pipeline in advance of hearing, the Commission is in a position to evaluate and weigh all of the economic and financial aspects of the proposal. Suffice it to state, had Callery and the other producers in this case had similar guidance in the form of evidentiary standards prescribed by Commission rule in advance of the remanded hearing, this case might never have arisen. To date, the Commission has not seen fit to promulgate producer certificate rules which would provide any guidance in determining the nature of the evidence which might be deemed relevant to support certification at an out of line price.

The true vice of the Commission's "in line" approach lies in its application whereby, in the certification of new sales, all "present Commission action is judged solely by measuring it against past Commission action" *Union Texas Petroleum, et al.*, 32 F.P.C. 279, 300 (1964). Thus, where all new certificates are conditioned to an "in line" price on the basis of a previously certificated "in line" price, the process becomes circular and involuted in time to a point where it becomes mathematically impossible to justify any price higher than the original "in line" price. Certainly, as the court below recognized, it is inconceivable that Congress meant to freeze producer rates to 1956-58, or any other particular time (R. 630). We respectfully submit that, while price is undoubtedly important in determining wherein the public interest lies, it is

not, as the court observed, "the whole thing" (R. 628) and the Commission clearly erred in restricting its inquiry in this case to price alone.

II. THE MORATORIUM ON RATE INCREASE FILINGS CANNOT BE JUSTFIED AS A STOPGAP MEASURE SINCE IT IS IN BASIC CONFLICT WITH THE REGULATORY SCHEME ENVISAGED BY CONGRESS

In its decision in *Federal Power Commission* v. *Hunt,* 376 U.S. 515, decided last Term, the Court held that:

> "Under the procedures of the Act, it is at the point of permanent or unconditional temporary certification that the provisions of § 4 become applicable. The gas has been permanently certificated into interstate commerce and the independent producer is then free to pursue the rate filing procedure of that section." (376 U.S. at 523).

While it is true that the Court did not have before it in *Hunt,* and specifically left open, the question of the extent of the Commission's power to condition a permanent certificate of public convenience and necessity (as opposed to temporary authorization) upon the applicant's agreement to waive the right to file for increased rates under Section 4(d) of the Act, we believe the court below was correct in holding that all rights granted and reserved to natural gas companies by Congress under the Act become fully operative at the time of permanent certification.

Were it otherwise, there would be little reason for the Commission to carry the regulation of producers beyond the point of permanent certification since, based on a finding of public convenience and necessity under Section 7(e) of the Act, the Commission could, without more, effectively require that a producer sell his gas at one price and one price only over the entire

life of the dedicated reserve, *i.e.*, declare a permanent moratorium at the time of permanent certification. Unlike Petitioners, we read nothing in the Court's decision in *Texaco* (*Federal Power Commission* v. *Texaco, Inc.*, 377 U.S. 33) which suggests that the Commission could properly achieve this end by rulemaking, nor do we understand *Catco* to stand for the proposition that the Commission may arbitrarily suspend at will the operation of Section 4 of the Act in the case of independent producers once they have been permanently certificated as "natural-gas companies" under the Act.

In the *Hope* case,[7] the Court found that the intent of Congress in passing the Natural Gas Act was to underwrite just and reasonable rates to the consumers of natural gas. That this purpose was to be accomplished under an act which did not contemplate a rate freeze was made clear by the Court in *Bowles* v. *Willingham*, 321 U.S. 503, decided the same Term as *Hope*, when it distinguished the Natural Gas Act from a price freeze statute, declaring that the Act is a price-fixing statute in which "Congress has provided for the fixing of rates which are just and reasonable in their application to particular persons and companies (321 U.S. at 516-17).[8]

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[7] *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591 (1944).

[8] In *Bowles* v. *Willingham*, the Court noted that the landlord who was precluded from receiving a fair and equitable rent for his particular property under the Emergency Price Control Act of 1942 had no cause to complain that the Act worked an unconstitutional taking of his property since the Emergency Act provided that "nothing in this Act shall be construed to require any person to sell any commodity or to offer any accommodations for rent" (321 U.S. at 517. By contrast, the Natural Gas Act requires that a jurisdictional sale, once begun, may not be abandoned without prior Commission approval under Section 7(b). See *Catco*, 360 U.S. at 389.

Moreover, while recognizing in *Hope* and *Catco* that the underlying Congressional purpose was to protect the consumer from excessive charges, the Court has held that the consumer has an interest not only in the price he pays for gas but also in an assured and continuing supply of the commodity itself. *United Gas Pipe Line Co.* v. *Memphis Light, Gas & Water Division,* 358 U.S. 103, 113. To that end, the Court has recognized that rates fixed by the Commission must be just and reasonable both to the consumer and to the natural gas company. Most recently, in commenting on the Commission's proposed area rate proceedings, the Court said that the rates ultimately fixed should not be "so high as to deprive consumers, or so low as to deprive producers of their right to a just and reasonable rate," *Wisconsin* v. *Federal Power Commission,* 373 U.S. 294, 310. Finally, in *Catco* and in *Sunray*[9] the Court held that the producer's one remedy to protect himself from being required to sell his gas at a price which was less than just and reasonable and therefore confiscatory lay in his right to increase his price under Section 4(d) in accordance with his contract. While the Act would give the Commission the right to suspend the collection of the increased price for a period of five months, there is no suggestion in the legislative history of the Act or in this Court's decisions interpreting the Act that Congress intended a moratorium period of greater duration once the sale or service rendered has been permanently certificated by the Commission.

The Commission has to date applied no standard other than historical price structure, or the "in line" price concept, where the producer's proposed price is

[9] *Sunray Mid-Continent Oil Co.* v. *Federal Power Commission,* 364 U.S. 137, 156.

alleged to be out of line. The Commission's final decision in the Southern Louisiana area rate proceeding cannot be expected to provide a panacea for the recurrent problem facing the Commission of determining the initial price at which new gas is required by the present or future public convenience and necessity since, as is now the case in Docket No. AR61-2, where just and reasonable rates for the area are being determined on 1960 cost data, the final determination will always be outdated by the time it is made.[10] Meanwhile, it is vital that the producer's one remedy to protect himself, namely, the right to file for and collect his contract price subject to refund, will be preserved.

III. ASSUMING THE COMMISSION HAD THE POWER TO REQUIRE REFUNDS IN THIS CASE, THE COURT BELOW PROPERLY HELD THAT REFUNDS SHOULD NOT BE ORDERED PENDING A DETERMINATION OF THE JUSTNESS AND REASONABLENESS OF THE PRODUCER'S RATES

A. The Commission Has No Inherent Equitable Powers

It is Callery's position, which it urged unsuccessfully below, that the Commission is not endowed with any inherent equitable powers. The fact that the Commission has a statutory existence does not confer any implied or inherent power upon the Commission to do what it did in this case, namely, order refunds of amounts collected pursuant to unconditioned permanent certificate authorization. The Commission is not, like a court, a dispenser of equity and it follows from its lack of equitable power that it had no power or

---

[10] In its recent Permian Basin Area Rate Opinion No. 468, issued August 5, 1965, the Commission has further extended its regulation of rates by moratorium by proscribing any rate increase filings above the prescribed area ceiling until January 1, 1968, without special order of the Commission.

jurisdiction to apply an equitable doctrine, namely, restitution.

Thus, in *Arrow-Hart & Hegeman Electric Co.* v. *Federal Trade Commission,* 291 U.S. 587, the Court noted that:

> "The [Federal Trade] Commission is an administrative body possessing only such powers as are granted by statute. It may make only such orders as the Act authorizes * * * but, that accomplished, [it] has not the additional powers of a court of equity to grant other and further relief * * * on the theory that this is necessary to render effective the prescribed statutory remedy * * *." 291 U.S. at 598.

Moreover, as the Supreme Court found in *Federal Trade Commission* v. *Eastman Kodak Co.,* 274 U.S. 619, any so-called "equitable" foundation for the refund required in this case could only be examined by the court below against the administrative authority delegated to the Commission by the Natural Gas Act. Under the Act, the Commission has no authority to fix rates retroactively, *Federal Power Commission* v. *Hope Natural Gas Co.,* 320 U.S. 591, 618. Accordingly, since the refunds ordered by the Commission in this case were based on what amounted to retroactive ratemaking, Callery was and still is of the opinion that the Commission lacked the authority to order refunds in this case.

B. Assuming the Commission Had the Power to Order Restitution In This Case, the Holding Below Was Correct

Based largely on the Court's decision in *Federal Power Commission* v. *Tennessee Gas Transmission Co.,* 371 U.S. 145, Petitioners object to the court's holding deferring refunds pending the determination

of the justness and reasonableness of the producer's contract rates (PSC Br., p. 33). In *Tennessee,* refunds were ordered only *after* a determination under Section 4(e) that the increased rates involved were unjust and unreasonable and, while the Court noted that refunds did not constitute a perfect remedy, it did not suggest that refunds were inappropriate.

In our view, assuming *arguendo* that the court below was correct in holding that refunds could be required in the unique circumstances of the case, the court was also correct in holding that a balancing of the equities required that the proper measure of refunds should be the difference, if any, between the producer's contract price and a just and reasonable rate. The court's recognition of the necessity for balancing the equities in this case is fully supported by the D. C. Circuit's opinion in the *Skelly* case, *supra,* where the court remanded on a finding that "further development and fuller consideration of the equitable factors other than those thought to flow from the mere absence of an explicit refund condition in the temporary certificates" was required (329 F. 2d at 250).

Assuming that the court of appeals' disposition of the refund issue is left undisturbed, it is Callery's further view that its potential refund liability, if any, must be based on an individual determination of the justness and reasonableness of Callery's initial contract price. The equities of the case require as much if the constitutional issue of confiscation is to be avoided.

IV. QUESTIONS NOT PRESENTED

Petitioners have sought to raise in their briefs questions which were not raised in their petitions in Nos. 21, 22 and 32. These questions relate to the fixing of the Commission's "in line" price and the matter of interest on refunds. Neither question was decided by the court below and neither question, we respectfully submit, is within the scope of the questions upon which certiorari was granted. Insofar as we know, no effort was made by Petitioners to amend their petitions to include these additional questions. Should the Court nevertheless be disposed to entertain the issues now raised, Callery would respectfully request leave to respond by supplemental brief and argument.

CONCLUSION

For all of the foregoing reasons, subject to the Court's disposition of the question presented in No. 26, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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October 1, 1965

COPY

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

Nos. 21, 22 and 32

THE UNITED GAS IMPROVEMENT COMPANY, ET AL., *Petitioners*

v.

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FEDERAL POWER COMMISSION, *Petitioner*

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On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENTS, THE SUPERIOR OIL COMPANY AND J. RAY McDERMOTT & CO., INC.

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On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF FOR RESPONDENTS, THE SUPERIOR OIL COMPANY AND J. RAY McDERMOTT & CO., INC.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit (R. 620-642) is reported at 335 F.2d 1004. The

opinions of the Federal Power Commission, Opinion Nos. 398 (R. 549) and 398A (R. 606) are published at 30 FPC 283 and 682.

JURISDICTION

The judgment of the Court of Appeals reversing the Commission's order and remanding the proceedings was entered on August 14, 1964 (R. 643). Orders granting the petitions in Nos. 21, 22, 26, and 32 were entered on March 8, 1965 (R. 645-647), 380 U. S. 931.

The jurisdiction of this Court rests on 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTIONS PRESENTED[1]

1. In a Certificate Hearing Under Section 7 May the Commission Properly Exclude all Evidence Other Than That Related to "In Line" Price?
2. In Such a Hearing May the Commission in a Permanent Certificate Order Deny Applicant the Right to Seek Rate Increases Authorized by Section 4 of the Act?
3. In Such a Hearing and Order May the Commission Require Applicant to Refund Amounts Collected Under its Prior Unconditioned Permanent Certificate Orders?
4. Assuming Arguendo That Absent Prior Condition or Agreement, a Permanent Certificate Order of the Commission May Impose an Obligation for Refund of Amounts Collected Under Prior Permanent Unconditioned Orders Vacated

[1] See Appendix "A", P. i.

ON REVIEW, MAY SUCH OBLIGATION BE MEASURED BY THE PRICE LATER FOUND "IN-LINE" WHEN:

A. THE "IN-LINE" PRICE ADMITTEDLY IS NOT JUST AND REASONABLE AND IS SHOWN TO BE CONFISCATORY?

B. THE PRIOR PRICES WERE COLLECTED UNDER ORDERS WHOSE EFFECT WAS NEVER STAYED?

C. APPLICANTS ARE COMPELLED TO ACCEPT THE CONDITIONS SUBSEQUENTLY IMPOSED BECAUSE THEY ACCEPTED THE PRIOR UNCONDITIONED ORDERS?

STATUTES INVOLVED

The Fifth Amendment to the Constitution of the United States,[2] and Sections 4, 7(c) and (e), and 19(c) of the Natural Gas Act (Act), 52 Stat. 821, as amended, are involved in this case. The pertinent portions of said Fifth Amendment read as follows:

> "No person shall * * * be deprived of * * * property, without due process of law; nor shall private property be taken for public use without just compensation."

Section 19(c) of the Act:

> "The filing of an application for rehearing under subsection (a) shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order." [52 Stat. 831 (1938); 15 U.S.C. 717r]

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[2] All section references are to the sections of the *Natural Gas Act*, 52 Stat. 821, as amended, 15 U.S.C.A. 717-717w.

Sections 4, 7(c) and 7(e) of the Act are set forth in Brief for the Federal Power Commission (Commission), Petitioner, App. A, P. 61-65.

STATEMENT OF THE CASE

The statement set forth in Commission Brief seems generally fair and will not be elaborated on at this point.[3] Details omitted therefrom will be set forth to the extent necessary in argument.

Brief of Petitioners in No. 21 will be referred to as that of UGI, brief of Petitioner in No. 22 will be referred to as PSC, and brief of Petitioner in No. 32 will be referred to as Commission.

SUMMARY OF ARGUMENT

This case is *sui generis*. The matters here involved arise in large measure because of the unique circumstance resulting from the commencement of sales in 1959 based on permanent unconditioned certificate orders which then became effective notwithstanding court review. All of such 1959 orders were later vacated by the courts because of insufficient record evidence and remanded to the Commission. The Commission orders here involved are those on remand. Thus, while purportedly "initial" certifications, such orders are retroactively applicable back to 1959. It is claimed that Respondents are bound to accept such orders regardless of the economic impact of price conditions therein which are claimed to be retroactive.

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[3] The statement "The court below held that the Commission erred in conditioning the certificates to an 'in-line' price • • •" (Com. Br. P. 7) is perhaps inadvertent error. The court simply held that "in-line" price, along with all other factors of public interest, must be evaluated and balanced. The "in-line" price may or may not be the public interest price (R. 628.)

In effect it is urged that Respondents are in an inescapable regulatory trap because they complied with the effective terms of Commission orders later held to be insufficiently supported by the early hearing records. There are no other such cases before the Commission. The only general regulatory policy of the Commission here involved is one fairly recently adopted [4] of arbitrarily refusing to admit or consider any evidence on public interest requirements other than that of price line and depriving natural gas companies of their statutorily preserved right to file rate increases.[5]

On the remanded hearing before the Commission, Respondents presented evidence designed to show that the prices proposed were required by present or future public interest because they were not "out of line", and that even if they were out of line, they were nonetheless required by present or future public convenience and necessity. Having no standard by which to measure in advance of hearing what evidentiary presentation would be deemed a sufficient showing of a "reason why" an out-of-line price was required by present or future public interest, Respondents, in an excess of caution, offered many different types of evidence, much of which was probably unnecessary. Such evidence showed that costs of finding, producing, and selling gas trended sharply upward from 1954 to 1960; that gas supply relative to annual withdrawals has trended sharply downward during the same period; that while demand for gas has trended upward, explor-

[4] See *Skelly Oil Co., et al.*, Docket Nos. G-18368, *et al.*, 28 FPC 401, 411 (1962), and even there the evidence was admitted but found insufficient.

[5] Under Section 4 of the Act.

ation (shown to be related to the field price received) has trended downward. In addition, Respondents' evidence showed that their historical unit gas costs on a rate base cost-of-service method, and their financial requirements for finding, producing, and selling such gas "was considerably in excess" of the prices collected (R. 623). All of this evidence was rejected by the Commission on the ground that it was irrelevant in a certification proceeding. The only relevant evidence was held to be that showing previously certificated prices as to which only prices the Commission had certificated at rates of 18.5¢ per Mcf or lower could be used to establish a price line to which the proposed prices could be compared; that under no circumstance could present or future public convenience and necessity require a higher price. This is the error found by the court below. It held that the evidence proffered was relevant to factors of present and future public interest and must be received and evaluated, along with the proposed price, in a final determination of public interest requirements.

The procedure for certification required by the court below is not unduly burdensome on the Commission. It is practicable and at the same time complies with the statute. Undoubtedly it would require, as does the statute, a hearing. Such hearing would not have to be extensive. If the price proposed was within the range of prices comparable with those being contracted for, certificated or paid in the area at the relevant time, other showing would be unnecessary. This would cover most situations. In the relatively few circumstances where the proposed price was out of line with the range of comparable prices, a "reason why" the proposed price was required by public interest

would then be necessary. Such showing would not need to be extensive if some reasonable standards by which to determine what evidence was and what was not necessary for such a showing were announced. No unnecessary evidence would be tendered.

We have not argued here the several factual and legal issues involved in the Commission's finding, which we deem erroneous, that 18.5¢ per Mcf plus 1.5¢ per Mcf tax reimbursement is the proper "in-line" price here. These questions were not raised nor fairly comprised in the questions presented in the several petitions for writ of error which the court granted. Under the Court's Rule 23(1)(c) we feel that those questions are not before the Court. If the Court wishes to consider these questions, we pray the opportunity to present a supplemental brief thereon with such further argument, if any, as the Court desires.

Since the proffered evidence showed that Respondents' cost exceeded the prices collected, and its rejection makes it conclusive on that issue, the Commission order imposing a reduction of such prices, for the past, present and future, constituted confiscation of Respondents' property. In addition, the Commission's refusal to consider relevant evidence offered on the statutory issue before it deprived Respondents of a full and fair hearing or due process of law.

The limited hearing held and the Commission order issued deprive Respondents of any opportunity of ever showing their entitlement to their contract prices between 1959 and the present. This results from the retroactive reduction of the so-called "initial" rate. That order adds further injury to loss by precluding filings for rate increases until approximately July 1,

1967. In this respect the Commission violates the regulatory framework of the Act created by Congress. This error is aggravated when, as here, Respondents' costs exceed their contract prices.

The Commission order for refund of amounts previously collected by Respondents was also erroneous. If in any case the Commission could order a refund, it could not properly do so here where the effect of the refund would be to impose a confiscatory rate on these Respondents. The fact is, however, under the present Act the Commission has no power to order reparations under the Act and refunds here are nothing but reparations. It lacks any inherent power normally flowing from general equitable powers because it lacks such equitable power.

Assuming *arguendo* that the Act authorizes the Commission to order refunds in some circumstance, it cannot do so here. Refunds are a form of restitution allowed to recoup amounts by which a party has been unjustly enriched. Respondents have collected only amounts they were obliged to collect under the Act. The self-styled Consumers' Representatives, Petitioners here, failed to protect themselves when they could have and they cannot equitably claim injury resulting from such failure.

In addition, Respondents' collections have been less than their costs. They have not been enriched at all, not even justly.

As the court below held, the Act protects the consumer only from unjust or excessive prices. The consumer is not entitled to rates lower than those which are just and reasonable. The "in-line" price is not a "reasonable" rate and thus there is no valid basis

for determining the quantum, if any, of refund. The present refund order is necessarily premature as the court below found.

ARGUMENT

I

Introduction

Petitioners in seeking to sustain the instant retroactive conditioning power of the Commission argue that in the normal Section 7 proceeding the Commission may condition downward a proposed price and no harm is done because acceptance of the conditioned certificate is elective. However, in the instant case they deny Respondents any such election.

Petitioners argue that a certificate condition reducing the initial contract price to an alleged "in-line" price is essentially "fair" to consumers and producers alike because even though the reduced price is not just and reasonable, the producer is then [6] free to increase his rate to the contract price and have the increase judged on the standards of just and reasonable, and the consumer is protected in the meantime. However, the right of these Respondents to file for their initial contract prices is denied for nearly ten (10) years. Because of Section 4(d), Respondents cannot possibly seek to change the conditioned rate for any past period.[7] This is now six years. Thus, Respondents are completely denied their initial contract rates,[8] although

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[6] Collection of any increased rate would be deferred thirty days Sec. 4(d), and if to be "tested" would be deferred an additional five months, Sec. 4(e).

[7] Section 4 does not permit retroactive filing for a rate change. *Shell Oil Co.* v. *Federal Power Com.*, 334 F.2d 1002, 1009 (3 Cir. 1964).

[8] For the past six years, and to July 1, 1967 if Petitioners have their way.

the justness and reasonableness thereof is a completely open and undecided matter. The justness and reasonableness of the "in-line" price imposed on Respondents for six years and of the anti-triggering line to approximately July 1, 1967 is also a completely open and undecided question.[9]

We do not contend that the Commission may not condition downward a proposed price in an *ex parte* temporary authorization, nor in a permanent order made after hearing where all factors of public interest duly balanced so require, provided in each case the applicant has then the election to reject the certificate, or to accept it and immediately file for the higher contract prices. That, however, is *not* this case.

The position of Respondents should be considered. The 1958 and 1959 permanent, unconditioned certificate orders were entered after full hearings, and in most cases, in the light of this Court's prior *Catco*[10] decision. The several proposals were found to be required immediately by public convenience and necessity. Urgency was shown by the requirement in most of the orders that they be accepted or rejected within not more than thirty days.[11] Petitioners here, United Gas Improvement Company and Public Service Commission of the State of New York, who deem them-

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[9] FPC Brief before the Fifth Circuit, Pg. 22; UGI and PSC Brief before the Fifth Circuit, Pg. 12.

[10] *The Atlantic Ref. Co.* v. *Public Service Com. of N. Y.*, 360 U.S. 378, (1959).

[11] 22 FPC 369, 377, Par. (C); 22 FPC 252, 260, Par. (C); and R. 123 "• • • there will be a definite deficiency • • • if additional gas is not obtained at once." It seems less than speculative that absent the gas supply made available by these Respondents, the public would have suffered from lack of gas since 1959.

selves "consumers' representatives", had contested the unconditional issuance of each of those certificate orders.[12] Under the provisions of Section 19(c) of the Act, however, those orders became effective unless stayed. No effort whatsoever was made by any party to obtain a stay. Respondents, therefore, notwithstanding possible court review, were bound to recognize the current effective nature of said orders and to comply therewith. This they did. Respondents could not stay the effect of orders which as to them were non-aggrieving. Therefore, they filed their contracts as rate schedules, and same were accepted by the Commission. Respondents commenced deliveries of gas under these effective rate schedules. It is the Respondents' compliance with the early orders, and the fact that a so-called "initial" certification order now to be entered will relate back to first deliveries, which Petitioners argue should place Respondents in a regulatory trap, a trap from which it is contended they should not be permitted to escape, regardless of the serious financial injury they suffer. All similar remanded cases have been disposed of[13] and we are not here concerned with temporary authorizations.[14]

It is almost inconceivable that the Commission, as a Petitioner here, would take such a position. Certainly the public interest is going to be greatly injured if every applicant who receives a satisfactory order of

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[12] Strangely enough in the light of their present contrary positions, on the ground that the proposed prices had not been shown to be just and reasonable (R. 32; 22 FPC 653; 22 FPC 655, 656; 22 FPC 657, 658).

[13] FPC Br. Pg. 5, Fn. 6.

[14] PSC Br. Pg. 21 "In the present case, of course, no temporary certificates are involved * * *."

certification after a contested hearing must await judicial review and affirmance of the Commission order before taking any step to implement the action which the Commission has found the public interest THEN requires.

The well nigh interminable delay of Section 5 investigations would seem expeditious by comparison. Section 19(c) of the Act is designed to prevent this very thing.

II

The Court Below Properly Reversed the Commission Order on Remand Because it Failed to Consider Evidence Bearing on all Factors of Present and Future Public Convenience and Necessity.

A. *The proffered evidence.* It is not deemed necessary to detail the evidence offered by Respondents and rejected by the Commission. In the words of the court below " * * * * it demonstrated that on a cost-of-service basis the cost to the producers was considerably in excess of the contract price sought * * * * " and it "showed the demand and supply situation existing both nationwide and in South Louisiana" and was "tied directly into the exploration for, and finding of, new gas supplies to meet the increased demands, the relation of field prices to those efforts, the impact of lowered prices on exploratory activity, and the like" (R. 623).

B. *The proffered evidence was relevant.* Significantly, none of the Petitioners contend in their Briefs that the proffered evidence of Respondents was not relevant and material to the factors of present and future public convenience and necessity. Their omission in this respect is understandable in the light of this Court's decision in *Federal Power Commission v. Hunt,* 376

U.S. 515, 525 (1964). There the Court had occasion to consider the power of the Commission under Section 7(c) and (e) of the Act as amended in 1942 and the purpose of the amendment. It was held that the purpose of the amendment was to give the Commission an opportunity to scrutinize the financial setup, the adequacy of the gas reserves, the feasibility and adequacy of the proposed services, and the characteristics of the rate structure of an applicant at the time of certification.[15] It goes without saying that the adequacy of gas reserves is shown by available gas supply relative to the current demand for gas with and without the proposal. Supply and demand was shown by the proffered testimony.[16] The feasibility and adequacy of a proposal necessarily depends upon whether revenues from a proposed sale will meet the financial requirements of the applicant in order that the supply of gas may be maintained. Financial requirements testimony was proffered.[17] The characteristics of a rate structure cannot be examined without evidence as to the proposed rates and their relation to the costs of the applicant. Historical cost of service was included in the proffered testimony.[18] Prices contracted for or previously certificated, the only evidence admitted into the record,[19] do not touch any of these factors.

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[15] House Committee on Interstate and Foreign Commerce, H.R. Rep. No. 1290, 77th Congress, First Session, 203, and Senate Committee on Interstate Commerce, S. Rep. No. 948, 77th Congress, Second Session, 1-2.

[16] R. 623.

[17] R. 623.

[18] R. 623.

[19] R. 201.

C. *All factors of present and future public interest must be weighed and balanced.* The judgment of the court below is fully supported by a reading of Section 7(e) of the Act and the construction of that section by this Court and by other courts of appeals previously considering and vacating prior Commission orders in these cases.

Sections 7(c) and (e) of the Act[20] provide for a hearing[21] and that an applicant otherwise shown qualified shall be granted a certificate if the proposal "is or will be required by the present or future public convenience and necessity". The requirement for hearing includes a full and fair hearing to square with constitutional due process of law.[22]

This Court specifically held in *Catco* that said section "requires" the Commission to "evaluate all factors bearing on the public interest" and that while proposed rates are a matter of prime importance they are not the only factor to be considered. The same point was made in *Federal Power Commission v. Transcontinental Gas Pipe Line Corp.*, 365 U. S. 1 (1960), when the Court again pointed out that Section 7(e) *requires* an evaluation of all factors bearing on the public interest and further pointed to the fact that the Commission's powers under Section 7 are "by definition limited", the limitation being that the Commission cannot require or compel the commencement of a sale. Its only function is to "exercise a veto power" over a proposal, and "it can only do this when a balance of all the circumstances weighs against certifica-

[20] Commission Brief, Appendix "A", Pgs. 64-65.

[21] *Federal Power Com.* v. *Natural Gas Pipeline Co. of America*, 315 U.S. 575, 583 (1942).

[22] *Morgan* v. *United States*, 304 U.S. 1, 18 (1938).

tion", 365 U. S. 1, 17. The Court also held that the term "public convenience and necessity" connotes a "flexible balancing process in the course of which all factors are weighed prior to final determination" and cited with approval *City of Pittsburgh v. Federal Power Com.*, 99 U. S. App. D. C. 113, 237 F.2d 741 (1956), finding it reversible error for the Commission to fail to consider even factors within its power of notice.

D. *The "law of the case" here is to the same effect.* Even if the purpose of this section of the Act and duty of the Commission under it had not been so clearly defined, here where each of the original certificate orders has been vacated and remanded to the Commission by an appellate court the proffered evidence would have been relevant under the law of the case as announced in the remanding cases. *Federal Power Commission v. Pacific Light & Power Co.*, 307 U.S. 156, 160 (1939); *Morand Bros. Beverage Co. v. National Labor Relations Board*, 204 F.2d 529, 532 (7 Cir. 1953), *cert. den.* 346 U. S. 909.[23] These remanding opinions employed the same rationale as the opinion below in their specific application of the "in-line" price concept announced by this Court in *Catco*. In each case the order was vacated for insufficient evidence and the cases remanded to "augment" the record to show a "reason why" the proposed prices were required. The Ninth Circuit in *United Gas Improvement Co. v. Federal*

[23] In the *Pacific Light* case it was held that the Court's judgment is "final and indisputable" as between the Commission and the parties. In *Morand* it was held that "In such a situation it behooves the inferior arbiter to exercise great care that 'the law of the case' is applied to the facts of the case when they have been precisely determined by it. This is even so when it finds itself in well founded disagreement with its reviewer."

Power Commission, 283 F.2d 817, 821 (1960), specifically pointed out that circumstances such as increased production costs, and others, might justify unconditional permanent certification of a price higher than a previous line of prices because of public interest requirements. To the same effect the Tenth Circuit decision in *United Gas Improvement Co. v. Federal Power Com.,* 287 F.2d 159, 163 (1961) held:

> "... public convenience and necessity may require certificating of a sale when the price is 'out of line'."

The Fifth Circuit's prior opinion in *United Gas Improvement Co. v. Federal Power Com.,* 290 F.2d 147, 148 (1961), reversed the Commission order for lack of evidentiary support and because in issuing same too little consideration had been given "to what might ultimately be a just and reasonable price."

The D. C. Circuit in *Public Service Commission v. Federal Power Commission,* 287 F.2d 146 (1960), held that when faced with a "suspiciously" high price for certification the Commission might attach such condition as it believes necessary or "grant unconditional certification upon evidence sufficient 'to support a finding of public convenience and necessity'" (at 149). That court reversed the Commission because the proposals there could not properly be unconditionally certificated by the Commission "without the supporting evidence that case [Catco] requires" and remanded for the specific purpose of permitting applicants there, some of whom are Respondents here, "if they so choose" to either "augment the record so as to support a certification without price condition or seek a certification appropriately conditioned", P. 150.

Each of these remanding decisions by the various courts of appeals construed this Court's *Catco* de-

cision in the same general way. Each recognized that a proposed price was of prime importance but was not the only factor to be considered and that to determine present or future public interest *all* factors must be evaluated and weighed.

E. *Catco so held.* Petitioner FPC contends that *Catco* held that the Commission committed error in giving controlling weight to elements of the public interest other than price. *Catco* held that *controlling weight* should not be given to *any* specific factor of public convenience and necessity but, to the contrary, all factors, recognizing price as of primary importance, should be evaluated in the balancing of public interest.

It is really very difficult to determine precisely what significance Petitioners place upon this Court's *Catco* decision. Indeed, the FPC Brief at Page 22 says that "Catco merely held that there was an insufficient evidentiary basis for certificating the Catco producers at a firm price 4.4¢ above that which the Commission had earlier found was the highest justified by the public interest", from which it argues that the Court did not "indicate" what evidence the Commission must consider for certification. Since *Catco* held that Section 7 required an evaluation of *all* factors of public interest and the Court was surprised that *evidence,* if available, showing a "reason why" that higher price was required by public convenience was *not presented,* it is submitted that *Catco* went beyond the point of "indication". Certainly *all* factors cannot be evaluated, nor a "reason why" shown without evidence in the record. Such a showing is obviously impossible if the Commission may summarily reject all evidence other than that relating to the line of past prices.

F. *Decisions relied on do not support Petitioners.* Great emphasis is placed by all Petitioners on the cases of *California Oil Company v. Federal Power Commission,* 315 F.2d 652 (10 Cir. 1963), and *The Atlantic Refining Company v. Federal Power Commission,* 316 F.2d 677 (D. C. Cir. 1963). Neither of these cases supports the contention that the consideration of "in-line" price testimony, to the exclusion of all other proffered evidence, is sufficient to justify a determination of public convenience and necessity. In these cases such issue was not raised. In those cases the parties had agreed that certificate issuance should be determined on the basis of an "in-line" approach.[24] The controverted point was the level of "in line" price. This would explain the "serious doubt" of the Tenth Circuit Court as to whether costs or delivery services were at all relevant to a determination of an "in-line" price. Obviously a price *line* is determinable only by prices. Costs become relevant only when the "in-line" price has been determined; is deemed by the applicant insufficient; and then further evidence which may include costs is submitted to show a "reason why" the "in-line" price should *not apply* to the proposed sale. This is our case.

To a certain extent the issue in *Public Service Commission of the State of New York v. Federal Power Commission,* 329 F.2d 242 (C.A. D.C. 1964 "Skelly") *cert. den.* 377 U. S. 963 was also limited to "in-line" price level. The order reopening that case was based upon a rehearing granted by the Commission as to the "in-line" price. Most of the evidentiary presentation

[24] 316 F.2d 677 at 680: "But here • • • [all parties] • • • agreed that price was the only issue to be considered • • •" for which reason "considerations other than price" could not be gone into.

and arguments of the parties related to what was in fact the "in-line" price. Notwithstanding, two of the producers did introduce other evidence of a limited nature. Such limited evidence the Commission found would "not form a proper basis for appraising financial requirements", 28 FPC 401, 410, 411. It is significant that the evidence *was received* and *was in fact considered* by the Commission, and even by the Court. On the basis of such consideration it was found insufficient to show a "reason why" the public interest required the proposed out-of-line price. The statement by the Commission that it did not think it "necessary or appropriate" to consider the evidence is belied by its opinion holding the evidence itself insufficient. The same is true of the Court's affirming, but somewhat equivocal, decision.[25] Be that as it may, the Court of Appeals' interpretation in *Skelly, supra*, of this Court's *Catco* opinion as "calling upon the Commission in Section 7 proceedings to condition certificates by requiring an 'in line' initial price" is obviously incorrect. All factors must be evaluated under *Catco* and *Trancontinental Gas Pipe Line Corporation, supra*. In *Skelly* the appellate court, like the Petitioners here as found by the court below, may have been "mesmerized" by the catch phrase of "in-line" price. Obsession with reducing prices (which incidentally have not leaped from plateau to plateau)[26] can become so complete that

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[25] 329 F.2d 242, 247: "• • • we need not hold that the Commission may never consider such evidence • • •."

[26] R. 222. See also Commissioner O'Connor's dissenting opinion in Opinion 468, Area Rate Proceeding AR61-1, issued August 5, 1965, Mimeo. pp. 17, 18; 34 FPC —, not yet reported. The moving average gas price in 1954 was 1¢ per Mcf less than in 1922, and the increase from 1954 to 1960 "oft-emphasized" was but .9¢ per Mcf greater than the "seldom emphasized" decrease from 1922 to 1940.

there is a failure to recognize that the public interest is injured by *too little gas* at an unreasonably low rate, but is served by "maintenance of adequate service" at a just and reasonable rate.

G. *Petitioners would ignore the statute.* The real position of Petitioners here is that regardless of statutory requirement what was done was "reasonable and necessary" [27] and should be permitted to facilitate administration of the Act under the "hold the line" statement of this Court in *Catco.* They ignore the holding, also in *Catco,* that the Commission should *not* "determine initial prices" but might condition them by providing for their collection subject to refund pending a "just and reasonable" determination under "other sections of the Act", 360 U. S. at 392.

Petitioners then contend that resort to "in line" certification will reduce the administrative backlog. This may be true for the real effect is to eliminate all hearings under Section 7. This, notwithstanding the statutory duty for hearings to determine present or future public convenience and necessity.

This indicates a total misconception of the Act. The public interest requires gas in large and increasing amounts. It is to be protected from lack of gas or an inadequate supply just as diligently as it is to be protected from excessive prices. The purpose of the Act is to make gas available as needed at the lowest reasonable price. *Federal Power Commission v. Hope Natural Gas Company,* 320 U. S. 591, 611; *Catco, supra,* at 388. Under Section 7 of the Commission has no right to prohibit the entry into interstate commerce of needed gas at any rate that is reasonable.

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[27] Commission Brief P. 16.

Federal Power Commission v. *Texaco Inc., et al.*, 377 U. S. 33 (1964), held unequivocally that the regulations there under consideration "do not pass on the merits of any rate structure nor on the merits of a certificate * * * *" application. "They merely prescribe qualifications for applicants", 377 U. S. at 42. Here the merits alone are at issue.

The Commission complains of the burden of considering elements of public need for gas and the economic requirements of the producers to provide the supply needed. Any determination of public interest is complex, but the balancing of "all the circumstances" is required by the statute. *Federal Power Commission* v. *Transcontinental Gas Pipe Line Corporation, supra.* Furthermore, the solution is suggested in *Catco* and is that required by the Court below.

H. *Statutory compliance is practicable.* First a reasonable "line" should be employed. It should be a range based on new contracts, new certifications, and current prices under older contracts in the area. A proposal no higher should be deemed in line. Assuming public need for the gas is shown, or is conceded, certification should issue without price condition.[23] Thus, a realistic establishment of a price line would reduce most hearings to a minimum. The bulk of all

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[23] In this connection the record refutation of the Commission's alleged need for protection against a "run-away gas price structure" is found in the testimony of Dr. J. Rhoads Foster (R. 222), i.e., "The upward push of South Louisiana prices began to slacken in 1957-1958 * * * and as Schedule 5 shows, the weighted average of initial base prices in South Louisiana leveled off at slightly below 21¢ per MCF" (exclusive of tax reimbursement). Obviously, a weighted average encompasses prices above and below the average.

proposals in the last few years would not be out of line.

If the price proposed is considerably higher than any prior prices, as in *Catco*—25% higher, then a full "reason why" should be required. In such a case, however, the fixing of reasonable standards for that type of hearing would bring the matter into manageable proportions. Compar[illegible]e drilling costs of the proposed supply with existing supply in the area might be sufficient, or a showing of cost trends for finding, producing, and selling gas of the particular applicant, or of all producers in the particular area, or of the entire industry, might be sufficient. Perhaps an industry-wide study of replacement costs might be required. The point is some idea of what would be sufficient would permit elimination of much evidence.[29] It would never be necessary to precisely determine a just and reasonable rate. The only necessary finding is that on the basis of the showing made the proposed higher price does not appear to be excessive, or is within the zone of reasonableness of a price that might ultimately be a just and reasonable rate, i.e. balancing the public need for the gas against the indicated financial requirements of the producer.

The hypothetical problem posed by Public Service Commission Brief P. 26 is one solved by the above process. If the "flexible balancing" weighs against certification, the application must be denied, or conditioned so that the public and the producer are protected. Commission Brief P. 18 correctly points to

[29] The court below refers to the possible need for ingenuity. We here suggest that tremendous inventiveness is not required, only the establishment of reasonable standards. *Hill* v. *Federal Power Commission*, 335 F.2d 355 (5 Cir. 1964).

the advantage of a firm unconditioned price to a producer. The disadvantages of uncertain conditions and possible refunds are implicit in that statement. Thus inadequate protection, if any, to the public under refund agreements, *Federal Power Commission v. Tennessee Gas Transmission Company,* 371 U. S. 145 [30] is balanced by a weighing of the need of the public against the apparently reasonable requirements of the applicant. The public should not be permitted to obtain gas at a price that is confiscatory to the producer.

If after all factors have been evaluated and weighed, the proposed price is not shown to be that required by public interest, to the extent that it appears excessive it should be appropriately conditioned, prospectively. Certainly a refund requirement prospectively imposed, is of significant protection to the gas user. Congress deemed it fully adequate, Sec. 4(e) of the Act.

III

The Issue of the Propriety of the "In-line" Price Found by The Commission Is Not Presently Before The Court.

Respondents raised and preserved before the Commission and the lower court serious questions as to the method by which the supposed "in-line" price was determined. It was pointed out that the method was circuitous, resulted in a price "freeze" never intended by the Act or *Catco,* disregarded prices at which large quantities of gas were then moving in commerce, and failed to take into account the Commission's own find-

[30] The inadequacy of refund there referred to was between a pipeline and the ultimate consumer. Frequently a new purchase, even at higher prices, does not result in increased pipeline charges. In such case protection would be adequate. In any case this and all other factors would have to be evaluated.

ings in other dockets. The lower court did not reach this point, and stated that these issues would be open on remand for rehearing and redetermination (R. 641).

None of the petitions for writs of certiorari submit questions upon this issue nor is it fairly comprised in questions which were submitted. Petitioners in brief would now present such question and ask that the Court here resolve the factual [31] legal [32] issues involved without prior consideration by the Court below. (See, e.g., FPC Brief, Pgs. 28-36.) The reason given is the delay resulting from an appropriate remand if reversal occurs.

This Court's rules [Rule 23(1)(c)] and decisions [33] indicate that the Court will not decide questions not included in the petitions granted.

For the above reasons, we do not here go into this question and the issues involved. Should the Court wish to now entertain the suggestion of a decision on

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[31] For example: In its remand opinion the Ninth Circuit expressly held that the Commission was obliged to consider 16 certain rate schedules therein referred to for determination of the price line. *United Gas Improvement Co.* v. *Federal Power Commission*, 283 F.2d 817, at 825. The Commission did not consider such sales. This clearly requires a determination of fact as to what the "line" would be if these higher priced sales had been considered.

[32] For example: In fixing a "line" for its tax reimbursement finding of 1.5¢ per Mcf the Commission chose to disregard all evidence from this record based on its findings solely on another case to which Respondents were not parties and involving a different time period and different evidence. May this be done, legally, when there is no evidence in this record to support the line found and this record supports only a higher figure for this item?

[33] *Mazer* v. *Stein*, 347 U.S. 201, 208 (1954). "The court's consideration will be limited to the question presented by the petition for the writ of certiorari." Cf. *Irvine* v. *California*, 347 U.S. 128, 129 (1954); *Lawn* v. *United States*, 355 U.S. 339, 362 (1958).

the question, Respondents request the opportunity of filing a supplemental brief concerning the matter and any further argument the Court may desire.

IV

The Court Below Properly Reversed the Commission Order Which Imposed a Moratorium on Rate Filings Authorized by Section 4 of the Act.

A. *Prior decisions support the court below.* As pointed out by the court below, the Commission Brief before that court [34] recognized that the courts in all of the decided cases bearing on the point have held that natural gas companies have a statutory right to file for contractually authorized rate increases under Section 4 whenever they deem such required. In their present Brief the Commission fails to even mention any of these cases except *Catco,* which it now contends supports its position because "there is nothing in the *Catco* opinion confining the Commission to conditions prescribing initial prices".[35]

We deem it only necessary to point out that the Court held in *Catco*:

> "The gas operator, * * * * is not without a remedy to protect himself (from a reduced initial price). He may, unless otherwise bound by contract, *United Gas Pipe Line Co. v. Mobile Gas Service*

[34] "It is true that in Catco; *Texaco Inc.* v. *FPC, supra,* 290 F.2d 149, *Atlantic Refining Company* v. *FPC,* supra, 316 F.2d 677, and *California Oil Co.* v. *FPC,* supra, 315 F.2d 652, * * * the courts assumed that any rate increases contractually permitted could be filed under Section 4 at any time after operations were commenced under a certificate. However, in none of those cases had the Commission sought to meet its hold-the-line obligation by a moratorium condition." Commission Brief, P. 39, in the court below.

[35] Commission Brief, P. 38.

> *Corp.*, 350 U. S. 332 (1956), file new rate schedules with the Commission." (At Pg. 389.)

Furthermore, the hold-the-line concept there mentioned necessarily exists only with "this framework in which the Commission is authorized and directed to act" which the court there outlined as above.

The economy of the natural gas industry has not changed from that existing eight years ago, when the Court in *United Gas Pipe Line Co. v. Memphis Light, Gas and Water Division,* 358 U. S. 103, 113 (1958) held:

> "Business reality demands that natural gas companies should not be precluded by law from increasing the prices of their products whenever that is the economically necessary means of keeping the intake and outgo of their revenues in proper balance."

Peculiarly appropriate here in light of the Commission's contentions is the case of *Willmut Gas & Oil Co. v. Federal Power Com.*, 294 F.2d 245 (D. C. Cir. 1961), *cert. den.* 368 U. S. 975 (1962), which held that the Act "does not contemplate that the Commission may refuse to file a tendered new schedule showing changes in rates or that it may summarily reject or disallow the new schedule without a hearing" and that a reach for such power under Section 16 of the Act is unavailing. That court said:

> "But the broad power granted by this statutory language does not authorize an order, rule or regulation which would nullify or restrict the right of a natural gas company to change the rates under which it offers to furnish service, subject only to requirement of Section 4(d) of the Act that it notify the Commission of the changes * * * * ", 294 F.2d at Pg. 250.

B. *The cases relied on do not support Petitioners.* All Petitioners rely upon this Court's decision in *Federal Power Commission v. H. L. Hunt,* 376 U. S. 515 (1964). In that case it was held that in the issuance of a temporary certificate the Commission could properly require that the conditioned price not be increased so long as the temporary certification remain in effect. The Court upheld that condition stating:

> "In view of the *ex parte* nature of the proceeding, it appears only fair to all concerned that the condition upon which the rate was temporarily certificated be continued unchanged until the permanent certificate is issued."

Following which, consistent with all prior decisions, it held that "at the point of permanent * * * * certification * * * * the provisions of Section 4 became applicable" and the producer is "then free" to pursue the rate filing procedure of that section (at P. 523). Thus, the *Hunt* case sustains the Commission's authority to preclude rate increases under temporary authorizations, but with equal clarity holds that such a prohibition is not proper in permanent certification. At the point of permanent certification Section 4 of the Act is fully available to the regulated company. To argue that the court did not say that the producers had particular "rights" under Section 4 is insupportable. The rate fixing and rate changing rights of a natural gas company are unaffected by the Act, but are only subject to the Commission's power of review. *Memphis Light, Gas and Water Div., supra.* Power not granted the Commission is a "right" preserved to the company.

Reliance on *Federal Power Commission v. Texaco, Inc.,* 377 U. S. 33 (1964) is equally misplaced. There,

a general rule [36] of the Commission providing that contracts after a particular date which contain indefinite pricing provisions will not be accepted in connection with certificate applications, or as rate schedules, was sustained. The basis of sustaining that rule and regulations pursuant thereto was "The present regulations do not pass on the merits of any rate structure or the merits of a certificate of public convenience and necessity; they merely prescribe qualifications for applicants." (At P. 42) The instant applications have long since been deemed procedurally acceptable. Only the merits are here at issue.

In large measure in *Texaco Inc., supra,* the Court seems to have been impressed by the fact that the rule involved prevented entry into interstate commerce of sales with "pre-arranged escalation clauses" which have a "built-in device for ready manipulation of rates upward", from which the Commission in its rule-making hearing had determined the public interest should be protected. Here we are not concerned with any pre-arranged escalation clauses nor indefinite pricing provisions of any sort. Here the rates provided, as to which increases are sought to be precluded, are the very type of rates which it was there argued were not at all involved or proscribed by the rule.

C. *Moratorium is arbitrary and unreasonable.* Issue is taken with the finding of the court below that the Commission's moratorium proposal here would compel the producers to sell gas for nearly ten years at a price less than the initial contract price which may be just and reasonable, and which Respondents have no oppor-

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[36] Commission Order No. 242, 27 FPC 339.

tunity to timely seek. The Commission contends that this is factually inaccurate but then belies such contention by conceding that in at least one of the contracts the so-called "triggering level" of 23.55¢ is even below the initial contract price of 23.8¢.

Level. It is further argued that the "antitriggering" level is "reasonable" because it is "substantially" above the "in line" price. That it exceeds the Commission determined "in-line" price which is concededly *not* a just and reasonable rate does not clothe it with reasonableness. Neither is reasonable. There is *no* evidence in this record that a rate for these Respondents in excess of 23.55¢ per Mcf would in fact trigger any prices.[37] The contrary does appear (R. 23, 54, 131, 132, and 197). A contention that a finding is erroneous certainly includes legal error arising from total absence of evidence in the record.

Voluntariness. The Commission Brief (P. 43) contends that the reasonableness of the time limit of its rate increase moratorium, "nearly" ten years, is of no consequence because Respondents had "voluntarily chosen to operate" for approximately six years prior to the Commission's 1963 decision. The producers here voluntarily elected only to abide by the 1959 unconditioned permanent certificate orders. After those orders were vacated, they were *forbidden* to cease their sales. One of the Respondents here in fact then discontinued its sale and so advised the Commission. The result was a telegram from the Commission ordering

[37] The basis of the 23.55¢ line is found only in a Commission Staff pleading, i.e. "Memorandum of Position", R. 439. Such is not evidence. While binding on the Commission as a pleading and thus strongly indicative that the "in-line" price is at least 23.55¢, it has no further weight.

that "deliveries should be immediately resumed" (R. 385-386). These Respondents have been compelled by the Commission to continue operations.

V

Refunds

A. *The Constitution prohibits refunds here.* The testimony proffered by Respondents shows that on a historical cost-of-service basis their cost is "considerably in excess" of the contract prices sought to be certificate (R. 623).[38] That evidence was rejected and, therefore, is not subject to denial but must be taken as proven. *City of Pittsburg v. Federal Power Commission, supra* at 748-749.

The Commission is prohibited by the *Fifth Amendment to the Constitution of the United States*[39] and the *Natural Gas Act* from imposing a confiscatory rate on any regulated natural gas company because the standard of the Act "coincides" with that of the Constitution. *Federal Power Com. v. Natural Gas Pipeline Co.*, 315 U. S. 575, 586, and the "lowest reasonable rate" is one which is not confiscatory, 315 U. S. at 585. The holding of the court below, that refunds could be calculated only after a determination of "just and rea-

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[38] As an example of individual cost see Ex. X-80, R. 366, which shows Respondent Superior Oil Company's unit cost at 24.34¢ per Mcf, exclusive of tax.

[39] Cf. *Los Angeles Gas Corp.* v. *Railroad Com.*, 289 U.S. 287, 305 (1933); *Railroad Com.* v. *Pacific Gas Co.*, 302 U.S. 388, 394, 395 (1938); *Denver Stockyard Co.* v. *United States*, 304 U.S. 470, 475 (1938); *Bluefield Water Works & Transportation Co.* v. *Public Service Com.*, 262 U.S. 679, 683 (1923).

sonable" rates was not expressly based on this proposition, but necessarily is supported thereby. This matter alone would require reversal of the Commission's refund order here.

B. *The Commission has no power to impose refunds.* Petitioner Federal Power Commission argues that the Commission, like a court, will correct what has been wrongfully done by virtue of its processes, and relies on *Arkadelphia Milling Co. v. St. Louis Southwestern Ry. Co.*, 249 U. S. 134 (1919). That court so held, but specifically on the ground that such power is an "equitable" one "inherent in every court of justice", P. 146.

Of course, an administrative body is NOT a court. It has no "equitable" powers and necessarily has no power "inherent" to equitable power. With reference to the Federal Trade Commission, it has been held:

> "The Commission is an administrative body possessing only such powers as are granted by statute."

and it

> "* * * * * has not the additional powers of a court of equity to grant other and further relief * * * * on the theory that this is necessary to render effective the prescribed statutory remedy * * * * *". *Arrow-Hart & Hegeman Elec. Co.* v. *Federal Trade Commission,* 291 U. S. 587, 598 (1934).

The case of *Federal Trade Commission v. Eastman Kodak Co.*, 274 U. S. 619, 623, 624 (1927), points out that such a body lacks "the authority of a court of equity" which extends even to the reviewing court.

Nor is there any doubt that the authority delegated to the Federal Power Commission falls short of the

power to order reparations or even to determine that past rates, not under suspension pursuant to Section 4, are unjust or unreasonable. *Federal Power Commission v. Hope Natural Gas Co.* 320 U. S. 591, 618, 619 (1944) " * * * * the Commission has no power to make reparation orders" but is limited to fixing rates "to be thereafter observed and in force" and "has no authority to enforce" findings of unlawfulness of past rates. See also *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.,* 341 U. S. 246, 254 (1951); *Civil Aeronautics Board v. Delta Air Lines, Inc.,* 367 U. S. 316, 325 (1961); *United States v. Seatrain Lines,* 329 U. S. 424 (1947); *T.I.M.E., Inc. v. United States,* 359 U. S. 464, 469-470 (1959).

Whenever the substantive act denies a power, no contrary power can be implied. *Stark v. Wickard,* 321 U. S. 288, 309 (1944).

In the circumstances of this case the Commission is exercising a rate making power—this power is quasi-legislative in nature. *Arizona Grocery Co. v. A.T. & S.F. Ry. Co.,* 284 U. S. 370 (1932). It may properly be only prospective in operation. *Prentis v. Atlantic Coast Line Co.,* 211 U. S. 210 (1908).

Hope Natural Gas Co. v. Federal Power Commission, 134 F.2d 287 (4 Cir. 1943) held specifically that under this Act the Commission has "quasi legislative, i.e., regulatory power as to the future rates; but there is no indication of any intention to clothe it with judicial or quasi judicial powers with respect to past charges or practices", at P. 309. This case was reversed on other grounds, *Federal Power Com. v. Hope Natural Gas Co.,* 320 U. S. 591 (1944), but in so doing the Court in effect affirmed the above statement say-

ing the Commission has "no power to make reparation orders" but only to fix rates "to be thereafter observed and in force", at P. 618.

C. *The cases relied on do not support Petitioners. Addison v. Holly Hill Fruit Products, Inc.*, 322 U. S. 607, 620 (1944), is relied upon as holding that an administrative body after remand of a prior order should retroactively act as conscientiously within the bounds of the power given it as it would have done initially had it limited itself to its authority, and to the same effect *Securities & Exchange Com. v. Chenery Corp.*, 332 U. S. 194 (1947), holding that after remand the Commission was bound to deal with the problem afresh, performing the function delegated to it by Congress.

Unquestionably the Commission here after remand should have dealt with the problems afresh, but it was still limited to exercise only the power granted. That grant does not include the power to order reparations. As pointed out in *Federal Power Com. v. Hunt, supra,* the Commission may act prospectively only under Section 7. In the words of the Court:

> "Clearly the Commission was given the power to lay down conditions precedent to the entry of the natural gas into interstate commerce." 376 U. S. at 526.

Obviously a "condition precedent" may not create a retroactive condition.

Petitioner Federal Power Commission cites, without specifically relying upon, *Public Service Com. of State of New York v. Federal Power Com.*, 329 F.2d 242 (C.A. D.C. 1964). That case dealt with refunds required in permanent certificate orders issued after temporary certificates had been in effect for some

while. The court referred to its prior decision, *The A lantic Ref. Co. v. Federal Power Commission,* 316 F.2 677, 679 (C.A. D.C. 1963), wherein it has held th there is "no mechanism for refunds of overcharg under Section 7", and distinguished the prior case o the ground that the quoted language was to be limite to *permanent certificates.* Considering the two case it seems clear that the D. C. Circuit Court has twic held there is in fact no mechanism for refund of ove charges where a permanent certificate has been issue We are not here concerned with temporary certificat orders."[40]

D. *In any event, refund payments should not be re quired.* With the issuance of the 1959 unconditione certificate orders there were certain operative an legal effects which necessarily followed. Those order were not stayed, and under Section 19(c) became ef fective. Respondents were thus required to file thei rate schedules and having filed them, to collect th rates there provided. Those rate schedules have neve been changed in any fashion. They are the only rate which have ever been effective for these sales and ar the only rates which any of these Respondents coul properly charge or accept under the Natural Gas Act Any departure from such filed rates would have vio lated the Act itself, *Hope Natural Gas Co. v. Federa Power Com.,* 134 F.2d 287, 311 (4 Cir. 1943), reverse on other grounds, *Federal Power Com. v. Hope Nat ural Gas Company,* 320 U. S. 591 (1944); *Louisvill & Nashville Ry. Co. v. Maxwell,* 237 U. S. 94, 9 (1915); *T.I.M.E., Inc. v. United States,* 359 U. S. 46 (1959); *Atlantic Coast Line RR Co. v. Fla.,* 295 U. S 301 (1935). In *Montana-Dakota Utilities Co. v. North*

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[40] Public Service Com. Brief P. 21.

western Public Service Com., supra, at 251, the Court specifically stated with reference to a regulated company under the Natural Gas Act:

> "It can claim no rate as a legal rate that is other than the filed rate, whether fixed or merely accepted by the Commission."

E. *Equitable standards preclude refund.*

(a) *The collections obtained were not excessive or unjust.* Clearly as the court below found, under the Act the consumer is not entitled to a windfall at the expense of the producer any more than the producer is entitled to a windfall at the expense of the consumer. Each is entitled to be served or paid on the basis established by the Act, i.e., a just and reasonable, non-discriminatory, non-preferential rate. As is admitted by all, the "in-line" price is not a "just and reasonable rate".[41]

Under equitable standards, restitution or refund of money is allowed only when the amounts collected by a prior erroneous order is excessive, so as to constitute "unjust enrichment". *Atlantic Coast Line RR Co.* v. *Florida, supra.* Respondents have not collected a "just and reasonable" or even "the lowest reasonable" rate. As mentioned above, their costs and financial requirements exceed the contract prices collected. Thus "unjust" enrichment is non-existent. There has been no "excessive" rate collected by Respondents and nothing, therefore, to restore.

It is argued that the Act does not guarantee a producer the right to file for and collect what he has urged

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[41] Commission Brief below P. 22. United Gas-Public Service Com. Brief below P. 12.

is a just and reasonable rate because initial certification is based upon a public convenience standard; however, public convenience and necessity contemplated by the Act can never *require* a non-compensatory or confiscatory rate. *Baltimore and Ohio Ry. Co.* v. *United States*, 298 U.S. 349 (1936); *Federal Power Commission* v. *Natural Gas Pipeline Co. of America*, 315 U.S. 575 (1942).

(b) *Petitioners made no effort to protect themselves.* Moreover, the rates which these producers have collected have been collected *because* the 1959 unconditioned certificate orders became effective. Respondents, totally unaggrieved by said orders, as a matter of law had no right to postpone their effectiveness. Furthermore, they could not reject them since they were "satisfactory" within the meaning of their contracts with the gas purchasers.[42] On the other hand, Petitioners were parties to those proceedings. United Gas Improvement and Public Service Commission felt themselves aggrieved by the 1959 orders and in fact sought judicial review thereof; however, they made no effort whatsoever to stay the effect of said orders. Absent a stay, under Section 19(c) of the Act the orders became effective.

The obtaining of stay orders is not at all unusual in connection with judicial review of orders which are deemed aggrieving. *Federal Power Com.* v. *Interstate Natural Gas Co.*, 336 U.S. 577 (1949); *Natural Gas Pipeline Co.* v. *Federal Power Com.*, 128 F.2d 481 (7 Cir. 1942).

Any contention by Petitioners United Gas Improvement and Public Service Commission that a stay order

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[42] R. 42.

would have been denied if applied for is, of course, speculative. The short answer is they did not try.

The failure to seek a stay pending review is the sole reason refunds are a matter for consideration. Even a court will not exercise its equitable powers to protect a litigant who has not used means available to protect himself. *Latta* v. *Western Inv. Co.,* 173 F.2d 99 (9 Cir. 1949), *cert. den.* 337 U.S. 940.

Furthermore, as held in *National Savings Bank* v. *Cresswell,* 100 U.S. 630, 643 (1880), where one of two innocent parties must suffer a loss, the loss should fall on the one who by reasonable diligence could have protected himself and failed to do so. See also *Guice* v. *Burrage,* 156 F.2d 304 (5 Cir. 1946).

F. *The procedure of the decision below is proper.* Assuming *arguendo* that refunds could properly be required, the court below provided the only proper solution. Obviously refunds can not be based on an "in-line" price which is lower than a reasonable rate. No public purpose is served by imposing irreparable damage and loss on the Respondents to the extent that the "in-line" price is less than a just and reasonable rate. The consumer is not entitled to gas at less than the lowest reasonable rate under any circumstance. Thus the limiting of refunds to the amounts collected, if any, in excess of a just and reasonable rate is the only just solution.

This procedure does not present an administrative monstrosity at all; it merely requires compliance with the Act.

The *Federal Power Commission* v. *Tennessee Gas Transmission Company,* 371 U.S. 145 (1962), holding that refunds when due should be passed to the con-

sumer as quickly as possible is unrelated to the unique circumstances here. In that case the fact of excess collections—collections in excess of a just and reasonable rate—had been determined, and the proper amount of such excess established. That has not happened here. Here the right or equity of any refund, and even more, the proper amount thereof, is unknown. When payment of any refund will be irretrievably lost to Respondents, the amount should not be a speculative figure prematurely arrived at. This is particularly true where the refunds are from collections over the past six years and the only reason for hasty determination is a possible inadequacy of the refund procedure resulting from the transient nature of the gas consumer population. This inadequacy may in itself be greatly exaggerated since the population change is largely restricted to residential consumers and their shares of any refund based on field price reductions is extremely small. In area rate proceedings it has been shown that in 1963 in the New York and Philadelphia areas less than 15 percent of the total bill paid by all consumers was attributable to the charges made by producers for such gas. The relative share of residential users is the smallest of the several classes of users, i.e., industrial, commercial, and residential.

CONCLUSION

For the foregoing reasons, subject to the action of the Court on the questions raised in No. 26 hereof and the questions raised in Petitions For Writ of Certiorari in Nos. 34, 35, and 36 still pending before the court, the judgment of the court below should be affirmed.

Respectfully submitted,

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APPENDIX "A"

"AMENDMENT V—CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS; JUST COMPENSATION FOR PROPERTY

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S.C.A. Constitution Amendment V.

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Nos. 21, 22, 32

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

THE UNITED GAS IMPROVEMENT COMPANY,
LONG ISLAND LIGHTING COMPANY, and
PHILADELPHIA ELECTRIC COMPANY,
Petitioners,

v.

CALLERY PROPERTIES, INC., ET AL.,
Respondents.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Petitioner,

v.

CALLERY PROPERTIES, INC., ET AL.,
Respondents.

FEDERAL POWER COMMISSION,
Petitioner,

v.

CALLERY PROPERTIES, INC., ET AL.,
Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT OCEAN DRILLING & EXPLORATION COMPANY

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit (R. 619-42) is reported at 335 F. 2d 1004. The opinions and orders of the Federal Power Commission (R. 549-93, 606-17) are reported at 30 FPC 283 and 682.

JURISDICTION

The judgment of the court of appeals reversing the Federal Commission's order and remanding the proceedings was entered on August 14, 1964 (R. 643). Orders were issued on November 6 and 12, 1964, extending the time for filing petitions for writs of certiorari in Nos. 26 and 32 until November 23 and December 12, 1964, respectively. The petitions were filed on November 10 (No. 21), November 12 (No. 22), November 23 (No. 26) and December 11, 1964 (No. 32). Orders were entered granting the petitions in all four cases on March 8, 1965 (R. 645-647). 380 U.S. 931.

The jurisdiction of this Court rests on 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTIONS PRESENTED

1. May the Federal Power Commission in a certificate proceeding under Section 7(e) of the Natural Gas Act attach price-reducing conditions to producer-applicants' certificates without considering cost, economic, and other evidence tendered by the producer-applicants to show why the present and future public convenience and necessity is best served by granting unconditioned certificates?

2. May the Federal Power Commission, without notice, hearing, or any supporting evidence, impose a condition on permanent certificates of public convenience and necessity forbidding the filing of contractually authorized rate increases above a specified level?

STATUTES INVOLVED

The pertinent provisions of the Natural Gas Act (Sections 4 and 7(c) and (e), 52 Stat. 821, as amended, 15 U.S.C. 717-717w) are reprinted in the Appendix to the Federal Power Commission's brief, pp. 61-65.[1]

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[1] References throughout this brief to sections "4", "5" or "7" refer to sections of the Natural Gas Act, 15 U.S.C. 717c, 717d, 717f.

STATEMENT

The Statement contained in the Federal Power Commission's (Commission's) brief fairly outlines the background of this case. Certiorari was granted in Nos. 21, 22 and 32[2] on the two questions restated and presented above and on a third question as to the measure of refunds in the event it is determined that the Federal Power Commission has authority under Section 7(e) of the Natural Gas Act to require producers to refund amounts previously collected pursuant to unconditional permanent certificates.[3] This brief is directed to the two question noted above.[4]

The court below did not reach the questions raised by Ocean Drilling & Exploration Company (ODECO) pertaining to the manner in which the Commission determined the "in-line" price to support its 20¢ per Mcf price condition

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[2] Petitioners in No. 21 are The United Gas Improvement Company, Long Island Lighting Company, and the Philadelphia Electric Company, all privately owned distributing companies who, of course, have a proprietary interest in seeing lower gas prices. These companies will be referred to singly as "UGI *et al*". Petitioner in No. 22 is the Public Service Commission of the State of New York which, as the name implies, is the state agency in New York responsible for utility rates. This state commission will be referred to singly as "New York". For simplicity, UGI *et al* and New York will be referred to collectively as the "Intervenors". The Commission is Petitioner in No. 32.

[3] ODECO as Petitioner in No. 26 has submitted a brief to support its position that under Section 7(e) of the Natural Gas Act the Commission has no authority to award reparations of amounts collected pursuant to unconditional certificates of public convenience and necessity. No. 26 has been consolidated with Nos. 21, 22 and 32 (R. 659).

[4] Assuming that the Commission has the power to order refunds, ODECO adopts the briefs of the other respondents in Nos. 21, 22 and 32 as to the measure of refunds.

or the error in the Commission's determination to require ODECO to pay interest on the refunds which it ordered. (R. 641, 640) Although the Commission as Petitioner in No. 32, now asks this Court to pass upon these undecided issues, they were not presented in the petitions in Nos. 21, 22 and 32 and were not included in the orders granting certiorari. Therefore, ODECO is not responding to the arguments directed to the "in line" price and interest questions. However, if the Court nevertheless decides to pass upon these questions ODECO requests the opportunity to submit a supplemental brief.

SUMMARY OF ARGUMENT

1. Under Section 7(e) of the Natural Gas Act a certificate applicant has the *burden* to show that his proposed price is required by the present or future public convenience and necessity. Accordingly, under the statute the certificate applicant must be given the *opportunity* to meet this burden. In the orders under review the Commission denied the certificate applicants the *opportunity* to meet their statutory *burden* by excluding all evidence except that related to other certified sales in the area.

2. The Commission does not have authority under the Natural Gas Act to impose a condition on permanent certificates of public convenience and necessity forbidding the filing of contractually authorized price increases in accordance with Section 4 of the Natural Gas Act. Further, the record is devoid of any evidence to support the 23.55¢ per Mcf price increase moratorium imposed by the Commission on the certificates issued in this case.

ARGUMENT

I.

THE COMMISSION ERRED IN REJECTING PROFFERED EVIDENCE RELEVANT TO A DETERMINATION OF THE PUBLIC CONVENIENCE AND NECESSITY

This case involves the failure of the Commission to afford producer-applicants the opportunity to explain the "reason why" their proposed contract prices are in the present and future public convenience and necessity even if they are higher than prices previously certificated by the Commission in the same area. The Commission takes the unqualified position that, in a Section 7 certificate proceeding, the only relevant evidence is that relating to prices previously certificated in the area and that it is not required to consider any other evidence bearing on the public convenience and necessity.

After erroneously concluding that ODECO's proposed price was not "in line" with prices previously certificated in Southern Louisiana,[5] the Commission refused to receive and consider evidence tendered by ODECO which would have explained the "reason why" its initial contract price was in the present and future public convenience and necessity. The Commission's refusal to consider such evidence was predicated *solely* on administrative convenience. The court below reversed the Commission, agreeing with ODECO that "The Commission must, however, hear and evaluate all relevant evidence bearing on public convenience and necessity when it is urged, or held,[31] that the proposed price is out of line." (R. 632).

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[5] ODECO's contracts were executed in 1958. The 18.5¢ per Mcf price for 1957-1958 contracts which the Commission found to be "in-line" constituted approximately the *lower* 25% by volume of the contracts executed during those years. (R. 297).

1. *CATCO* and its Progeny

Since *CATCO*[6] is the only producer certificate case involving the price issue which this Court has considered since its first *Phillips*[7] decision, each petitioner relies on this important decision in discussing what evidentiary criteria must be considered in certificate proceedings.[8] *CATCO* involved a sale by four producers to Tennessee Gas Transmission Company of 1.67 trillion cubic feet of natural gas from offshore Louisiana at an initial price of 22.4¢ per Mcf including tax reimbursement of 1¢ per Mcf. The Commission had twice refused to issue a certificate to the producers at this price and the producers had threatened not to dedicate this large gas supply to interstate commerce. Finally, Tennessee notified the Commission that if a certificate was not issued to the producers this needed gas supply would be forever lost to the interstate market. On the third attempt the Commission granted certificates to the producers at their contract prices on "the primary consideration that the public served through the Tennessee Gas system is greatly in need of increased supplies of natural gas . . ." 360 U.S. 386.

This Court reversed the Commission, describing the *CATCO* record thusly:

> "Our examination of the record here indicates that there was insufficient evidence to support a finding of public convenience and necessity prerequisite to the issuance of the permanent certificates. The witnesses tendered developed little more information than was included in the printed contracts. As the proposed contract price was higher than any paid by Tennessee,

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[6] *Atlantic Ref. Co.* v. *Public Serv. Comm'n*, 360 U.S. 378 (1959).

[7] *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672 (1954).

[8] In describing *CATCO* Judge Brown once stated "Catco came up on a bare bones record with some macabre-like implications." *United Gas Improvement Co.* v. *FPC*, 290 F. 2d 133, 141 (5th Cir.), *cert. denied*, 368 U. S. 823 (1961).

including offshore production in the West Delta area of Louisiana, it is surprising that evidence, if available, was not introduced as to the relative costs of production in the two submerged areas. Moreover, the record indicates that the proposed price was some 70% higher than the weighted average cost of gas to Tennessee; still no effort was made to give the 'reason why'." 360 U.S. at 392-93.

This Court further held, that under Section 7 of the Natural Gas Act the Commission is not required to make a Section 4 or 5 just and reasonable rate determination, but that the "inordinate delay presently existing in the processing of §5 proceedings requires a most careful scrutiny and responsible reaction to initial price proposals of producers under §7". 360 U.S. at 391.

In response to the teachings of *CATCO*, the courts of appeals[9] reversed four Commission certifications of sales from Southern Louisiana based upon records completed prior to the issuance of the *CATCO* opinion.[10] The orders of the Commission under review in these four cases were issued after *CATCO* and in each the Commission concluded that the applicants met the *CATCO* standards. But

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[9] *Public Serv. Comm'n* v. *FPC*, 287 F. 2d 146 (D.C. Cir. 1960), *cert. denied*, 365 U.S. 880 (1961); *United Gas Improvement Co.* v. *FPC*, 290 F. 2d 133 (5th Cir.), *cert. denied*, 368 U.S. 823 (1961); *United Gas Improvement Co.* v. *FPC*, 290 F. 2d 147 (5th Cir.), *cert. denied*, 366 U.S. 964 (1961); *United Gas Improvement Co.* v. *FPC*, 283 F. 2d 817 (9th Cir. 1960), *cert. denied*, 365 U.S. 879 (1961).

[10] Six weeks after *CATCO* this Court summarily reversed the Court of Appeals for the Third Circuit which had affirmed a Commission order certificating new sales in Southern Louisiana which was entered prior to *CATCO*. *United Gas Improvement Co.* v. *FPC*, 269 F. 2d 865, *vacated*, 361 U.S. 195 (1959), ". . . with directions to remand the case to the Federal Power Commission for reconsideration and redetermination in the light of *Atlantic Refining Co.* v. *Public Service Com. of New York*, 360 U.S. 378, 3 L. ed. 2d 1312, 79 S. Ct. 1246."

as the Court of Appeals for the District Court of Columbia stated:[11]

> "The Supreme Court noted, in the Catco case, that the record before it supplied 'little more information than was [contained] in the printed contracts.' Id., 360 U.S. at page 392, 79 S. Ct. at page 1256. It does not appear to us that the record presently under review is materially better than that found to be deficient in Catco. Although the order now before us was handed down a month after the Supreme Court had spoken in Catco, the evidence was taken before the court's opinion was rendered, and thus before it had become known that additional explanatory proof would be required to support inflated prices." 287 F. 2d at 149-50.

Likewise, the Court of Appeals for the Fifth Circuit in reversing one of the *CATCO* progeny noted:[12]

> "We do not attempt to determine what the 'line' is on this record. We have no doubt that in this case the price of 23.8 cents per Mcf, including the tax reimbursement,[1] was out of line as the term was used by the Supreme Court. The only evidence on this record that supports such 'out of line' price is the fact that it was negotiated at arms' length and was required by the intense competition. This, as we have said, is not enough. *It is clearly incumbent on the proponent of such a rate to make some showing of the 'reason why' (as it was expressed in the CATCO opinion) 21½ cents, excluding tax, is the proper initial rate in 1958 when the parties were freely contracting in 1954 at half that figure.*" (Emphasis added). 290 F. 2d at 138.

ODECO's certificate applications were originally involved in the Commission's order reversed by the Court of Appeals

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[11] *Public Serv. Comm'n* v. *FPC*, 287 F. 2d 146 (D.C. Cir. 1960), *cert. denied* 365 U.S. 880 (1961).

[12] *United Gas Improvement Co.* v. *FPC*, 290 F. 2d 133 (5th Cir.) *cert. denied*, 368 U.S. 823 (1961).

for the District of Columbia.[13] That court specifically remanded the case to the Commission "for further proceedings in which the producer applicants may, if they so choose, either augment the record so as to support a certification without price condition, or seek a certification appropriately conditioned".[14]

2. ODECO's Attempt to Augment the Record

The reversals spawned by *CATCO* returned to the Commission where all were eventually consolidated and set for hearing (R. 409-21). Certain lessons seemed evident from the reversals. No longer would producers be granted permanent certificates at prices substantially above prices previously paid by their pipeline purchaser merely by showing that their contracts were negotiated at arms' length; that another pipeline had offered approximately the same price for the gas; that their proposed price was "in keeping with numerous other certified sales in the area",[15] and that if the Commission did not grant the certificate at the proposed price that the gas might not be dedicated to interstate commerce. It also seemed clear that if the proposed price was substantially higher than the prices theretofore paid by the pipeline purchaser, that the producer was going to have to explain the "reason why" the increased price was in the present and future public convenience and necessity. At the same time *CATCO* expressly held, and the inferior courts echoed, that a Section 7 producer certificate proceeding was not a Section 4 or 5 rate proceeding and that the Commission was not required to determine a just and reasonable price or conduct a rate hearing to determine the appropriate price in a certificate proceeding.

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[13] *Public Serv. Comm'n* v. *FPC*, 287 F. 2d 146, 150 (D.C. Cir. 1960) *cert. denied*, 365 U.S. 880 (1961).

[14] *Public Serv. Comm'n* v. *FPC*, *supra* note 13.

[15] 287 F. 2d at 150.

After remand, the immediate unanswered question obvious to all was what kind of evidence and how much was required for a producer to receive a price higher than the prices previously paid by his pipeline purchaser.[16] The problem was compounded by the failure of the Commission to declare what type of evidence it envisioned was required by *CATCO* to support unconditional certification. Absent any guidance in the remanded proceedings ODECO presented the evidence summarized below.[17]

Company-wide financial requirements as shown by all domestic exploration and development activities conducted by ODECO from its inception in 1953 to December 31, 1961. On the basis of three alternative approaches, ODECO compared costs and revenues over the life of all oil and gas reservoirs found by ODECO. Each of these comparisons reflected a substantial revenue deficiency (R. 356-59). This evidence clearly demonstrates on the basis of ODECO's revenue requirements the 'reason why' its initial contract price of 21.5¢ per Mcf, plus tax reimbursement of 2.05¢ per Mcf, is the proper initial price.

ODECO also participated with three other producers in a four-company economic analysis which demonstrated the

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[16] In reversing the unconditional certificates issued to ODECO, the Court of Appeals for the District of Columbia noted: "The Catco decision does not prescribe a standard of proof which must be satisfied to support an unconditional certification." *Public Serv. Comm'n* v. *FPC*, 287 F. 2d 146, 150 (1960), *cert. denied*, 365 U.S. 880 (1961).

[17] ODECO did have the benefit of the remanded *CATCO* decision issued January 22, 1962. *Continental Oil Co.*, Opinion No. 351, 27 FPC 96 (1962). In the remanded *CATCO* proceedings the Commission received and considered cost of service studies, a discounted cash flow study, reserve studies, evidence of drilling and operating costs, etc.

ever-increasing sums of money required for exploration and development operations in Southern Louisiana. In addition, ODECO helped sponsor industry-wide evidence relating to the increased cost of production and exploration, the decline in the ratio of gas supplies to production, the price advantage of natural gas over other competitive fuels for many years, and similar data for the United States and Louisiana.[18]

ODECO does not contend that the above evidence is the *sine qua non* of producer certificate proceedings. However, ODECO does contend that such evidence is relevant to a determination of the public convenience and necessity, particularly since it tends to show the increasing costs being incurred by ODECO and other producers which were reflected in the rising sales price level in Southern Louisiana. ODECO should have saved the time and expense, for the Commission upheld its Examiner's exclusion of all of the evidence described above. The Commission did not attempt to strike a balance between a full-blown rate proceeding and the "bare bones" records which led to the earlier reversals. Nor did the Commission afford ODECO and the other producers the opportunity to augment the record so as to support unconditional certification. Instead, the Commission decided not to allow *any* cost, economic, or other supporting evidence but relied solely on evidence of other certified sales in the area. To do this the Commission developed the "in-line" concept, concluding that it was *not* in the public convenience and necessity for a producer to sell gas in interstate commerce above the "line" even if

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[18] Obviously this evidence falls far short of the standard necessary to determine a just and reasonable rate. *Continental Oil Co.* Opinion No. 351, 27 FPC 96 (1962).

the producer by supporting evidence could justify a breach above the "line".[19]

3. The "In-Line" Concept

The most important aspect about the Commission's "in-line" concept is that the Commission takes the position that the "in-line" price is the public convenience and necessity price. The idea for determining an "in-line" price germinated with *CATCO* when this Court said:

> "Where the proposed price is not in keeping with the public interest because it is out of line . . ."[20]

The Ninth Circuit interpreted the "out of line" language as follows:

> " . . . the 'line' referred to in Catco may properly be referenced to relevant existing producer prices under which substantial amounts of natural gas move in interstate commerce."[21]

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[19] It is ironic that in 1959 the producers, to the dismay of the Intervenors, asked this Court's blessing of a procedure that ignored any explanation of the underlying basis for increased gas prices. Now in 1965, the Commission and Intervenors, to the dismay of the producers, ask this Court's blessing of the same type of procedure whereby the Commission refuses to consider any evidence to support increased gas prices and consequently issues certificates with price-reducing conditions. Further, it is interesting to note that counsel for UGI, in the oral argument in *United Gas Improvement Co.* v. *Continental Oil Co.*, ... U.S. ....., 14 L. Ed. 2d 466 (1965) advised the Court that, "Secondly, the real issue here should not be what the pipeline pays for the gas *but what the producers pay and what it costs them to bring the gas from the ground.* So unless the producers are made part of this record, and they are subject to regulation, you are going to have Texas Eastern trying to litigate this matter by having to prove what somebody else's costs were." (Transcript of Argument, p. 41).

[20] *Atlantic Ref. Co.* v. *Public Serv. Comm'n*, 360 U.S. 378, 391 (1959).

[21] *United Gas Improvement Co.* v. *FPC*, 283 F. 2d 817, 823 (9th Cir. 1960), *cert. denied*, 365 U.S. 879 (1961).

On brief in this case the Commission defines the "in-line" price as:

> ". . . the highest price at which substantial amounts of gas had been certificated to enter the market under other contemporaneous certificates not themselves subject to court review or otherwise suspect."[22]

Regardless of the definition used, it is more important to determine what the Commission does in actual practice. To begin with, the Commission staff prepares an exhibit listing all of the contracts in a particular geographical area filed with the Commission for a certain time period — in the instant case for the years 1957-1958. This exhibit contains the names of the buyers and sellers, contract and certificated prices and some of the quality specifications (sulphur, water, and carbon dioxide content, etc.). It does not contain any elements of cost or any data such as drilling depths, size of reserves, ability of the reserves to produce, delivery conditions, supply and demand factors, or any evidence to show the price necessary for the maintenance of an adequate gas supply.[23] The Commission then determines the "line" on the basis of the permanently certificated prices contained in the exhibit.[24]

It is extremely important to understand at this point what the Commission does because it explains why the same Intervenors who asked for reversal in this Court six and one-half years ago in *CATCO* are now defending the Commission on the same type of inadequate record. The Commission does not examine the actual contract prices negotiated by the parties free of governmental restraint which would at least have some materiality as to what the economic interplay of the free marketplace had created. The Commission only looks to what *it* has done

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[22] Brief for FPC, p. 17.

[23] For example, under the Commission "in-line" system, gas produced from offshore Louisiana at depths of 15,000 feet receives the same price as gas produced onshore at depths of 3,000 feet. Therefore of necessity, the Commission compares "apples with oranges".

[24] If there is an insufficient number of permanently certificated prices, the Commission examines temporary certificates.

before, *i.e.*, to certificated prices. In the first contested hearing for producer certificates in a particular geographical area the only permanent certificates which are available to be examined are those which the Intervenors have not previously contested, presumably because the price was satisfactory to them. Once an "in-line" price is determined, it perpetuates itself because the Commission will thereafter look to the prices previously permanently certificated as evidence of the price line in future proceedings. The circularity in the procedure is self-evident.[25] When you consider that the Commission and the Intervenors are contending that the "in-line" price and the "public convenience and necessity" price are the same, you reach the result that the public convenience and necessity price is the price which Intervenors do not oppose.[26] In this manner the Commission has abdicated to Intervenors the responsibility to determine prices consistent with the present and future public convenience and necessity. At the same time, use of this "in-line" price method also explains why the Intervenors do not want any other evidence offered to support higher prices in the record. It is a mathematical certainty that prices will be frozen at Intervenor-approved levels.[27]

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[25] The mechanical "in-line" price theory is discussed in Morris, *Recent Independent Producer Certificate Cases: The "Suspect Order" Rule*, 32 GEO. WASH L. REV. 489 (1964).

[26] For an excellent review of the Commission's present policies with regard to producer regulation including producer certificate cases see Ross, *The Area Rate Proceedings: An Unsettled Experiment in Public Control of Natural Gas Prices*, 18 Sw. L. J. 163 (1964). Mr. Ross was counsel for the Commission in *CATCO* and was also formerly counsel for United Gas Improvement Co., one of the Intervenors.

[27] The Commission eliminates many contracts at certain prices from consideration, on the basis that the contracts are the subject of litigation or that the price level in the contracts is the same level as prices in litigation. The effect of such an absurd attitude is that any price level contested by the Intervenors automatically eliminates any consideration of prices at that same level in a producer certificate proceeding. This system has resulted in the elimination of all prices above 18.5¢ per Mcf in determining the "in-line" price in Southern Louisiana causing a price freeze at that level from 1956 through 1962.

4. The Court Below

There are some statements in Petitioners' briefs describing the holding of the court below on the exclusion of evidence question which may be misleading. The court below did not hold that the Commission should not determine an "in-line" price; indeed, the court below expressly recognized that the in-line price "is an important, sometimes decisive factor." (R. 625). What the court below held was that the Commission does not satisfy its statutory obligation by merely determining an "in-line" price. The Commission is required by the Natural Gas Act to determine the price that is consistent with the *present* and *future* public convenience and necessity, which entails a broader inquiry than simply examining *past* regulatory action as exemplified by "other certified sales in the area".

In reversing the Commission for its refusal to consider any cost, economic or other supporting evidence, the court below properly characterized the Commission's and Intervenor's philosophy:

> "As though Catco began and ended with 'in-line' the Commission and the intervenor-distributors are mesmerized by this catch phrase into supposing that the Commission's responsibility is discharged with that limited inquiry and if unsatisfied on that score, it is free to reject out of hand a producer's application for a new service." (R. 627)

The court below pointed out that the Commission does not fulfill its statutory duty by a limited inquiry into the "in-line" price, stating:

> "To be sure, if the proposed price is not 'in-line' this may become the dominant factor in denying the appli-

> cation. But it must be done as a part of the larger element of 'public convenience and necessity'." (R. 628)

Time and again the court below emphasized that the Commission is required by *statute* to determine whether a proposed sale is in the public convenience and necessity and that this broad term means more than the limited inquiry into whether the price is "in-line".[28] The court below admonished the Commission:

> "The task facing the Commission in this developing field calls for innovation and adaptation. It is not, therefore, enough merely to inquire whether the price is 'in-line'. On the other hand, for § 7 purposes, there need not be a full dress § 4 or § 5 rate hearing. The Commission must, however, hear and evaluate all relevant evidence bearing on public convenience and necessity when it is urged, or held, that the proposed price is out of line." (R. 632)

5. Justification Offered by Petitioners for Excluding the Proffered Evidence

Petitioners have employed what might be called the "negative defense" to support their position that cost, economic and other evidence should not be permitted in producer certificate proceedings for the purpose of determining the public convenience and necessity price. The principal reason given to justify not receiving such evidence is that it would defeat administrative expediency, or stated differently, to

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[28] The court below expressed surprise that the Commission was determined to remain in blissful ignorance of our changing times: population centers are increasing at a tremendous rate; demand for natural gas is increasing; where is the supply and how will it be satisfied; what revenues will be needed to find a large enough gas supply to satisfy the ever increasing demand, etc. (R. 629).

receive and consider such evidence requires additional time and effort. To a lesser extent, Petitioners also argue that such cost and economic evidence is duplicative of evidence being received in area rate proceedings. Finally, Petitioners urge that producers will not be hurt by limiting evidence in certificate proceedings to the determination of an "in-line" price because in the normal situation[29] they can reject the certificate offered by the Commission if they believe the "in-line" price is too low.

The Commission has apparently concluded that if one shred of evidence other than evidence of prices being paid to other producers in the same area during the same time period is admitted that an administrative monstrosity will result. This is not true. The Commission admitted and thoroughly cross-examined cost and economic evidence similar to the evidence now in dispute in the proceedings underlying Opinion No. 351,[30] Opinion No. 362,[31] and Opinion No. 399[32] without a "monstrosity" resulting. Under current Commission procedure, there are between 60 and 80 applications from a contiguous geographical area consolidated and set for hearing. Even fewer producers are involved since many producers have more than one application. Out of this number there are usually not more than a dozen producer counsel in any one hearing.[33] The majority of the evidence is presented on a joint basis by the producers, *i.e.*, the producers all support the same witness. For

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[29] In this case the producers were not given the opportunity to reject the conditioned certificates.

[30] *Continental Oil Co.*, Opinion No. 351, 27 FPC 96 (1962).

[31] *Skelly Oil Co.*, Opinion No. 362, 28 FPC 401 (1962).

[32] *United Gas Pipe Line Co.*, Opinion No. 399, 30 FPC 329 (1963).

[33] Many of the producers are not represented in these hearings and do not participate in the administrative process, preferring to take whatever price is awarded them, no matter how low.

example, in Opinion No. 351, which was the *CATCO* remand, Continental Oil Company, one of the four *CATCO* producers, presented a cost of service presentation based on Continental's costs and made the assumption that the other three producers' costs were the same. Repeatedly, in Opinion No. 351, the Commission pointed out that Continental's presentation fell far short of the type of proof required for § 4 or § 5 proceedings. The producers, as well as the Commission, have accumulated considerable experience since the early days of producer regulation and know that it is not necessary for each producer to present, for example, separate witnesses on cost trends, production depths, etc. The producers have little difficulty in making joint presentations on problems common to each.[34] Given any guidance from the Commission, the producers in this case would have made more joint presentations with less duplications than they did. A dogmatic "no evidence" approach is not the answer required to avoid the detailed intricacies of a "just and reasonable" rate determination. Considerations of administrative convenience should not be used to deny the admissibility of relevant evidence or to deny a certificate applicant the opportunity to show the reason why a proposed price is in the present or future public convenience and necessity.

New York and UGI, *et al,* in their briefs before this Court have attempted to inject the idea that the producers prefer protracted certificate proceedings.[35] Apparently this theory is premised on the hypothesis that the Commission issues temporary certificates *ex parte* to producers at whatever price the producers request, and that if the producers

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[34] In these consolidated proceedings each producer is entitled to rely on *all* of the evidence presented.

[35] Brief for the Public Service Commission of the State of New York, pp. 20-21; Brief for the United Gas Improvement Co., et al, pp. 28-30.

impede the hearings on the applications for permanent certificates that they can continue to collect "excessive" prices under temporary certificates for longer periods. First, the Commission does not grant temporary certificates at whatever prices the producers seek and has the full power which it frequently uses to condition temporary certificates to lower prices. In the second place, the Commission could insert refund conditions in temporary certificates with a floor at a level satisfactory to the Intervenors so that the producers could collect their full contract prices during the pendency of the temporary certificates. If it was later determined that the price was too high the producer would then refund the excessive amounts collected. The Commission also frequently utilizes this latter procedure.[36] Intervenors would virtually eliminate producer certificate proceedings rather than require the Commission to properly exercise its discretion in issuing temporary certificates.

Incidental to their delay argument, Intervenors state that protracted hearings will result in the producers collecting excessive prices for long periods to the detriment of the consumer even if the excess price is later refunded. This is an unusual argument since the alternative approach which they advocate is to develop a procedure to issue permanent certificates quickly at lower prices and then let the producer immediately file for rate increases which will be suspended and collected subject to refund. Under either system, interstate pipelines may pay prices subject to refund for long periods. However, the producer greatly benefits by having an early opportunity to seek a *firm* price at a level which he thinks is justified. On brief

[36] Of course, if the Commission does not insert refund conditions in temporary certificates which the Intervenors believe are necessary, then they may appeal such action to the courts.

in this Court, the Commission very eloquently states why the producers want a firm price not subject to refund as soon as possible.[37]

> "For very sound economic reasons, many producers wish to commence service at a firm price rather than run the risk of the indefinite and potentially large refund obligations which could result if they were certificated at contract rates subject to a refund condition should these rates ultimately prove unjustified. If they know the price is free and clear, they can release funds for operational purposes, make necessary payments to royalty owners (who often are entitled to a percentage of the sales price) and meet their obligations under State taxing statutes (which in many areas are calculated at a percentage of producer revenues)."[38]

New York sponsors the duplicative evidence argument, which is: why allow the producers to introduce cost and economic evidence in a certificate proceeding when the same type of evidence can be heard in an area rate proceeding! The Commission examiners, now with the approval of the Commission in the Permian Basin area rate case,[39] have systematically excluded all individual cost and economic evidence in the area rate proceedings. For a small producer

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[37] Brief for FPC, p. 18.

[38] The Permian Rate proceeding just completed took 5 years and approximately 250 hearing days to complete. The Southern Louisiana Area Rate proceeding now in progress has completed approximately 260 hearing days as of this date. Consider this in contrast to the hearing days in the three opinions in which cost evidence was admitted: Opinion No. 351 (48 days); Opinion No. 362 (10 days); Opinion No. 399 (23 days). Is it any wonder that: "Thus in the nine in-line determinations made prior to the present opinion, of a total of 87 sales whose initial price was set below contract levels, only 13 have subsequently filed for higher rates, either to the original contract level or to take advantage of periodic escalations subsequently coming due." Brief for FPC, p. 19.

[39] *Area Rate Proceeding*, Opinion No. 468, ... FPC ..... (1965).

such as ODECO with only a few sales, this duplicative evidence argument is devastating since the Commission will never have any evidence before it in either certificate or rate proceedings which would show what the price set by the Commission does to the small producer. In any event, the evidence which the producers want the Commission to consider in a certificate proceeding is not the evidence of the kind and quality necessary to find a just and reasonable rate such as is now being considered in the area rate proceedings. The area rate proceeding evidence is much more extensive and sophisticated and, indeed, a small producer could not afford to make such costly presentations.

New York also suggests that the producers can reject a certificate in the usual situation or, in any event, they can file for a rate increase up to their contract price. The latter argument is, of course, subject to the qualification that there be no price moratorium such as the Commission and Intervenors are defending in this case. In any event, the producers' option to reject certificates is fictitious relief which this Court clearly recognized in its *CATCO* opinion when it stated, "Since some 90% of all commercial gas moves in the interstate market, . . ."[40] Almost all of the nation's natural gas supply comes from four or five states and these states can only absorb a limited amount of the natural gas produced within their borders. If a producer rejects one interstate sale he does so because he has found intrastate market. He cannot expect the Commission to offer any better terms if he once again offers his gas in the interstate market.

6. A Practical Remedy

The problem still remains — how to reconcile the two extremes — the Commission's theory that prices can be de-

[40] *Atlantic Ref. Co.* v. *Pubic Serv. Comm'n*, 360 U.S. 378, 394 (1959).

termined in a sterile "in line" vacuum versus the *"alleged"* intention of the producers to convert every §7 certificate proceeding into a § 4 or § 5 rate proceeding. ODECO suggests that with a little thought, a little time, and a little effort, particularly on the part of the Commission, that this problem can be resolved. ODECO and other producers have no objection to the determination of an "in-line" price. An "in-line" price properly determined is material and relevant in a Section 7 certificate case. Most producers would rather accept the "in-line" price than become engaged in an administrative hearing with an agency of the Federal government. ODECO suggests that the Commission continue to determine an "in-line" price in each certificate proceeding and hold that the producers can collect this price on a minimal showing, *i.e.*, after they have shown a need for the gas, that they are ready, willing and able to perform under their contracts according to the Natural Gas Act, and that the contracts were negotiated at arms' length.[41] It is only as to those producers who want something more than the "in-line" price that the Commission should admit additional evidence to give the producer the opportunity to prove he is entitled to a higher price. All ODECO asks is to be given the *opportunity* to shoulder the statutory *burden* by showing that its proposed price is consistent with the public convenience and necessity even if its proposed price exceeds an appropriately determined "in-line" price.

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[41] Apparently, the Commission contemplated this procedure at one time. See *United Gas Improvement Co.* v. *FPC*, 283 F. 2d 817, 820 (9th Cir. 1960), *cert. denied*, 365 U.S. 879 (1961) where the court stated:

> "It is apparently with reference to this principle that the Commission states in its brief: 'Where a proposed price is 'in line' a certificate issues on a minimal showing; where, however, the price is 'out of line' the applicant must make an extensive demonstration in support of his rate, else he suffers a certificate denial or a price reduction'."

II.

THE RECORD IS DEVOID OF ANY EVIDENCE TO SUPPORT THE 23.55¢ PER MCF PRICE INCREASE MORATORIUM IMPOSED BY THE COMMISSION

In the orders under review the Commission imposed a condition on the certificates issued to ODECO forbidding the filing of rate increases above 23.55¢ per Mcf until July 1, 1967 or the completion of the Southern Louisiana Area Rate proceeding, whichever is earlier. (R. 582) ODECO agrees with the court below that the Commission lacks statutory authority to impose such a price increase moratorium. However, the briefs concurrently filed by other respondents will thoroughly discuss this point so that further discussion by ODECO appears unnecessary.

In addition, ODECO points out that there is absolutely no evidence in the record to support the Commission's conclusion that triggering and price redeterminations will result from the filing of rate increases above 23.55¢ per Mcf.[42] The Commission does not attempt to show any evidence to support this conclusion.[43]

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[42] In fact, sales from the Southern Louisiana area have been made under permanent certificates issued by the Commission at firm prices of 24.05¢ per Mcf since 1959. See Opinion No. 321, *Trunkline Gas Co.*, Opinion No. 321, 21 FPC 704 (1959).

[43] This lack of evidence results from the fact that no party in the hearings before the Commission contended that such price increase moratorium should be imposed or presented evidence directed to the price at which triggering and price redeterminations would result. Therefore, the Presiding Examiner's decision does not even discuss the price increase moratorium question. This lack of notice and hearing alone is sufficient to vitiate the Commission's *sua sponte* imposition of a price increase moratorium.

Instead, the Commission argues that ODECO did not properly preserve this error in its application for rehearing before the Commission (Br. p. 44). In particular, the Commission cites a fragmentary portion of ODECO's application for rehearing and contends that ODECO failed to properly preserve the error now asserted.[44] ODECO submits that the Commission's attempt to hide behind this technicality is to no avail, since the point of error in its application for rehearing clearly and unequivocally raised the price increase moratorium issue and the lack of evidence to support the 23.55¢ per Mcf triggering level found by the Commission.[45]

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[44] The Commission also urges that ODECO had the burden to reopen the record to controvert the Commission's finding as to triggering and price redeterminations (Br. p. 44). This novel theory contradicts established precedent that the proponent of a certificate condition has the burden to support such condition by substantial evidence and soundly based findings in the record. *Pure Oil Co.* v. *FPC*, 292 F. 2d 350, 352 (7th Cir., 1961). Until such supporting evidence was presented, ODECO had no burden to adduce evidence to controvert the Commission's unsupported "finding."

[45] The pertinent portion of ODECO's application for rehearing provides as follows:

> "The Commission has erred and has exceeded its authority in Ordering Paragraph (C) providing a moratorium on the filing of all price increases in excess of 23.55¢ per MCF pending the issuance of a final decision in the area rate proceeding in Docket No. AR61-2 or until July 1, 1967, whichever is earlier.
>
> "There is no evidence in the record before the Commission which pertains to the effect of filing by Odeco of its contractual price increase." (R. 603).

A reading of the full point of error (R. 603-606) removes any doubt that ODECO adequately raised the issue now asserted.

CONCLUSION

For the foregoing reasons, it is respectfully requested that the opinion of the court below be affirmed except insofar as it affirms the Commission's power to refund amounts previously collected pursuant to unconditional permanent certificates.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

Nos. 21, 22 and 32

THE UNITED GAS IMPROVEMENT COMPANY, ET AL., *Petitioners*

v.

CALLERY PROPERTIES, INC., ET AL., *Respondents*

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, *Petitioner*

v.

CALLERY PROPERTIES, INC., ET AL., *Respondents*

FEDERAL POWER COMMISSION, *Petitioner*

v.

CALLERY PROPERTIES, INC., ET AL., *Respondents*

On Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR RESPONDENTS, J. R. FRANKEL, ET AL.

OPINIONS BELOW

The opinion of the Court of Appeals (R. 620-642) is reported at 335 F. 2d 1004. The opinions of the Federal Power Commission, Opinion No. 398 (R. 549) and 398A (R. 606), are published at 30 F.P.C. 283 and 30 F.P.C. 682.

JURISDICTION

Respondents adopt the jurisdictional statement of the brief for the respondents, The Superior Oil Company, *et al.*, in Nos. 21, 22 and 32.

STATUTES INVOLVED

Respondents adopt the statement in the brief for the respondents, The Superior Oil Company, *et al.*, in Nos. 21, 22 and 32.

QUESTIONS PRESENTED

Respondents concur in Questions 1, 3 and 4 advanced by respondents, The Superior Oil Company, *et al.*, in Nos. 21, 22 and 32. Additionally, as to these respondents, J. R. Frankel, *et al.*, the question is also presented:

> 5. Whether the lower court's reversal of the Commission's refund order was not, in any event, correct because:
>
> (a) The Commission's procedures were essentially unfair and denied the producers a fair hearing;
>
> (b) No certificate of public convenience and necessity could have issued to these respondents under Section 7 of the Natural Gas Act since they were totally unable and unwilling to make the sale or perform the service purportedly authorized.

STATEMENT OF THE CASE

The brief for the Federal Power Commission contains a concise and generally fair statement of the case (FPC Br., pp. 3-7). As to J. R. Frankel, *et al.*,

respondents,[1] the following is also necessary to an understanding of the specific circumstances of their case, viz:

On August 30, 1957, J. R. Frankel and R. R. Frankel applied (R. 5-11) to the Commission for a certificate covering a sale to Transcontinental Gas Pipe Line Corporation from the North Thibodaux Field, Lafourche Parish, Louisiana, under a contract dated August 12, 1957 (R. 2-4). After hearing, the applicants were granted a certificate, unconditioned as to price, but requiring prompt acceptance (Opinion No. 315, dated September 4, 1958; R. 12-30). J. R. Frankel and R. R. Frankel filed the sales contract as their rate schedule on November 13, 1958 (R. 2, *et seq.*) which filing was accepted, and on January 30, 1959, commenced deliveries.

J. R. Frankel and R. R. Frankel sold the properties in question to Berkshire Oil Company (a family corporation) on August 1, 1960, and Berkshire was duly substituted as the applicant in the Commission's docket (R. 392-394), and the rate schedule was redesignated by the Commission as Berkshire's schedule. By instrument effective as of November 2, 1961, Berkshire sold these properties, along with other properties, to Continental Oil Company (R. 568-569). Berkshire was then promptly liquidated and its rights and obligations became vested in its former shareholders, J. R. Frankel, et al. (R. 568-569). Continental Oil Company sought and obtained from the Commission a certificate to continue the sale in question (*In the Mat-*

[1] Respondents are J. R. Frankel, R. R. Frankel, L. R. Frankel, Mae Frankel Shalett, H. T. Shalett, and the Estate of the late Maurice Frankel. Respondents are also petitioners in No. 34 (October Term, 1965).

ter of Continental Oil Company, F.P.C. Docket No. CI62-5108; *Cf.* R. 542-544, 568-569). A motion to substitute J. R. Frankel, et al., as parties to the instant docket was granted (R. 542; 568).

Meanwhile, the Commission's order granting respondents' predecessors an unconditioned certificate had been reversed and remanded.[2] The remanded proceeding was at first consolidated with the Area Rate Proceeding, AR61-2 (R. 376, *et seq.*). On January 10, 1962, the Commission issued an *ex parte* order (R. 395-401) notifying the parties for the first time that the Commission proposed to impose on the producers a refund obligation. The instant docket and others were then severed from the Area Rate Proceeding, consolidated with other dockets involving remands from various circuits, and a hearing date fixed (R. 409-422).

Because respondents had no interest in any continuing sale, and the only question as to them was the issue of refunds, respondents moved to sever the instant docket from the consolidated proceedings (R. 453-455). This motion was never acted upon. Hearings were then held (R. 200-254). Respondents offered evidence (R. 343-351) designed to show, among other things, that their predecessor's unit cost of service exceeded the initial contract rate; all such evidence was excluded out-of-hand (R. 489-493).

The attention of the Examiner and of the Commission was called to the fact that respondents' predecessor, Berkshire, had sold the property and that Continental had been certificated in its place; that Berkshire had been dissolved; and that respondents did not seek a certificate and were wholly unable to fulfill its

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[2] *United Gas Improvement Company* v. *F.P.C.*, 361 U.S. 195.

responsibilities (*Cf.* R. 239-242; 248-249; 568-569). Nevertheless, respondents were issued a certificate by the Commission. The only provision of this order that could have any possible operative effect on respondents is that provision ordering respondents to make refunds.

The lower court agreed with the Commission as to its power, under the unique circumstances of this case, to impose refunds on respondents, but held that the amount of the refunds should be measured against a just and reasonable rate to be determined hereafter. Respondents sought a writ of certiorari from this Court, which petition has not been acted upon.

SUMMARY OF ARGUMENT

The respondents are the former stockholders of a dissolved corporation, Berkshire. Berkshire had sold the property in question to Continental, and Continental had been granted a permanent certificate in lieu of Berkshire. Berkshire dissolved. All of this was done openly and with proper advice to and consent by the Commission. The effect is to preclude the issuance of any certificate under Section 7 of the Act to these respondents who are wholly unable to continue any sale or make any deliveries. And if the Act denies the Commission the power to issue any certificate, it also denies the Commission the power to impose a condition on the certificate, for the condition may not stand when the certificate falls. While the lower court did not agree with this argument, nevertheless, it supports the Court's reversal of the Commission's refund "order".

In any event, the proceedings before the Commission were so essentially unfair as to deny due process. The Commission pre-determined the existence of a

refund obligation, without notice or hearing; failed to provide any standards or rules by which materiality of evidence would be judged; excluded all evidence relating to public convenience and necessity other than "price line" evidence, including evidence designed to show the nonexistence of a refund obligation; and then measured the extent of the pre-determined liability against the "price line" without regard to whether or not the "line" was less than a just and reasonable rate or was confiscatory. Here, too, the lower Court's reversal of the refund "order" is supported, although on a basis other than that stated below.

ARGUMENT

As to Questions 1, 3 and 4 here presented, respondents adopt the position assumed in the Brief for Respondents, The Superior Oil Company, *et al.*, with slight addition. Question 5, on the other hand, is not covered in that brief.

As to all phases of the refund issue, Question 5 has a significant bearing, as we will demonstrate.

I. The Essential Unfairness of the Commission's Refund Order Justified the Lower Court's Reversal

Here, an unsought, unwanted and unacceptable certificate of public convenience and necessity impossible of performance, is thrust upon the successors of a producer. If viable at all, all that the order can accomplish is to order the repayment of past excessive rates. No exercise in semantics can change the character of such an order. It results in reparations, which the Commission is powerless to grant.[3]

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[3] *F.P.C.* v. *Hope Natural Gas Co.*, 320 U.S. 591, 598. And see *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246.

Further, the order is based upon a record that mocks due process. On January 10, 1962 (R. 395-405), without notice or opportunity to be heard, the Commission pre-determined an obligation to make refunds. The Commission's order of January 10, 1962, together with its order denying rehearing on March 7, 1962 (R. 410-421), was relied upon by the Presiding Examiner as determinative (R. 522-523). The Commission, in turn, relied upon the Presiding Examiner's decision (R. 561). The net result was that, without notice or opportunity to be heard, the order of January 10, 1962 made an *ad hoc* determination of refund obligations which effectively closed the mind of the Examiner on the subject and, indeed, the Commission's own mind.

Again, respondents' predecessor was required by the Commission's order of March 7, 1962 (R. 410-421), to file, in advance of hearing, the evidence on which it would rely; but the order did not specify the kind of evidence which the Commission would consider. Respondents' predecessor complied, under accompanying protest. The protest read, in part (R. 242):

> "Finally, Berkshire shows that the Commission's order of March 7, 1962 requires petitioner to determine at its peril the type of evidence which the Commission may hereafter 'deem material to determination of the public interest initial price or prices'. Although it is now almost eight years since the decision of the Supreme Court of the United States in Phillips, the Commission has not yet laid down appropriate guides as to what evidence will be deemed material to determination of the public interest initial price or prices. Under such circumstances, to require a litigant to select in advance of hearing the evidence to be submitted at the hearing, to be restricted to the previously-filed evidence in its presentation, and thereafter to determine, upon rules thereafter to be announced,

the materiality of such evidence, violates the fundamental principles of fair play, as well as procedural due process."

The essential unfairness of this procedure was perpetuated at the hearing. Although this Court's decision in CATCO[4] expressly required an evidentiary showing of a "reason why" an out-of-line price would meet the tests of the public interest, the Commission excluded all such evidence, even that offered for the express purposes (1) "to show that the filed rates were just and reasonable", (2) "to show that any reduction in the filed rates would result in confiscation", and (3) "to show that the imposition of a retroactive rate condition would involve serious inequities . . ." (R. 238-242).

What the Commission did, in summary, was the equivalent of a Star Chamber inquiry. By predetermining the existence of the obligation, by excluding all evidence designed to show the nonexistence of the obligation, and by measuring the extent of the obligation in the vacuum of this record it effectively denied to *all* respondents any semblance of a fair hearing.[5] And, as to these respondents, it confiscated their property without due process or just compensation.[6]

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[4] *Atlantic Refining Co.* v. *Public Service Commission of New York*, 360 U.S. 378.

[5] By due process of law is meant ". . . a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial". Argument of Daniel Webster, Esq., in *Dartmouth College* v. *Woodward*, 4 Wheat. 518, 581.

[6] This, because the excluded evidence showed a revenue deficiency even under the contract rates. The imposition of a confiscatory rate violated the Fifth Amendment to the Constitution and the Natural Gas Act. *F.P.C.* v. *Natural Gas Pipeline Co.*, 315 U.S. 575, 586.

These factors, under the circumstances of this case, would have supported the reversal of the refund order in any event; necessarily they support the basis of the reversal given in the opinion below.

II. The Instant Certificate Issued in Violation of Section 7 of the Natural Gas Act Because Respondents Are Unable and Unwilling to Meet the Requirements for Certification

Section 7 of the Act requires that a certificate "shall be denied" unless the Commission finds that the applicant "is able and willing properly to do the acts and perform the service proposed" and that "the proposed . . . sale . . . is or will be required by the present or future public convenience and necessity . . ." Positive findings are required and substantial evidence must support them.[7]

The record herein is clear that respondents' predecessor, Berkshire sold the producing property effective November 2, 1961, that the Commission granted Continental a permanent certificate for the continuation of the sale, effective November 2, 1961, and allowed Continental to succeed to Berkshire's rate schedule. Berkshire dissolved and the Commission substituted its former stockholders (these respondents) as parties.

These actions of the Commission were taken advisedly, and with full knowledge of the sale to Continental, of Berkshire's dissolution, and of Berkshire's (and later respondents') reiterated determination not to accept a certificate containing a repugnant price condition. The effect of these actions was to put it beyond respondents' power to receive or accept, and beyond the Commission's power to issue to respondents, any

[7] *Atlantic Refining Co.* v. *Public Service Commission of New York*, 360 U.S. 378, 392.

certificate whatsoever. On the face of it, these respondents can sell no gas and make no deliveries. The Commission recognized this when it certificated Continental.

The fact of the matter is that the Commission was determined to exact reparations. In order to avoid the appearance of a reparations order, it used the form of a condition in a certificate. But in so doing, it fell into a springe of its own devising. By disguising its reparations order as a certificate "condition" under Section 7, it imposed upon its certification the requirements of Section 7. If it is a certificate condition, the certificate itself must meet the tests of Section 7; the "condition" cannot survive separate and apart from its certificate.

As to these respondents, the above showing would have been ample ground for a reversal by the lower court of the Commission's order granting a certificate. While the lower court refused to disagree with the Commission in this particular, this issue serves as additional support for the reversal by the lower court of the refund order.

CONCLUSION

For the foregoing reasons, and subject to the action of the Court on the questions raised in No. 26, and in the Petitions in Nos. 34, 35 and 36 now pending, the judgment of the Court of Appeals should be affirmed.

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IN THE

Supreme Court of the United States

October Term, 1965.

No. 26.

OCEAN DRILLING & EXPLORATION COMPANY,
Petitioner,

v.

FEDERAL POWER COMMISSION,
PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
THE UNITED GAS IMPROVEMENT COMPANY,
LONG ISLAND LIGHTING COMPANY,
Respondents.

BRIEF FOR RESPONDENTS THE UNITED GAS IMPROVEMENT COMPANY AND LONG ISLAND LIGHTING COMPANY.

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THE UNITED GAS IMPROVEMENT COMPANY,
LONG ISLAND LIGHTING COMPANY,
Respondents.

BRIEF FOR RESPONDENTS THE UNITED GAS IMPROVEMENT COMPANY AND LONG ISLAND LIGHTING COMPANY.

COUNTER-STATEMENT OF THE QUESTION INVOLVED.

Does the Natural Gas Act authorize the Federal Power Commission to exercise its conditioning power under § 7 so as to protect the consumer from past Commission error as to price level, corrected on court review before the erroneous action had become final under § 19, by requiring disgorging of excesses collected by producers above the price required by the public convenience and necessity?

COUNTER-STATEMENT OF THE CASE.

Ocean Drilling & Exploration Company (ODECO), Petitioner in No. 26, executed contracts with Hope Natural Gas Company (Hope) an interstate pipeline company, on October 23, 1958, and December 13, 1958, for the sale of natural gas in interstate commerce from the Block 4 Field of the East Cameron Area and from the Bayou Pigeon Field in South Louisiana. The contract initial price for this gas was 23.55¢ per Mcf (R. 538). ODECO applied for certificates of public convenience and necessity under § 7 of the Natural Gas Act and its application was consolidated with those of other producers and heard. After this first hearing the Commission erroneously granted unconditional certificates to ODECO at the high price levels (R. 116-41). The Public Service Commission of the State of New York, representing consumer interests, petitioned for rehearing (R. 142-52), and when this was denied, appealed to the Court of Appeals for the District of Columbia. That court reversed, holding that the Commission erred in issuing the unconditioned certificate. It said:

> "As one solution [on remand], 'the Commission in the exercise of its discretion might attach such conditions as it believes necessary' to protect the public interest while other rate testing procedures are in process. [citing *Atlantic Ref. Co. v. Public Service Comm'n,* 360 U. S. 378, 391]." *Public Service Comm'n v. FPC,* 287 F. 2d 146, 149 (D. C. Cir. 1960).

ODECO, on remand, again sought the issuance of the certificate required under Section 7 for it lawfully to make its sales of natural gas in interstate commerce. The Commission after hearings on remand exercised its discretion to attach conditions to certification requiring (1) an initial price per Mcf of 20¢ (including tax reimbursement) and (2) refund of all amounts collected by ODECO in excess of

the 20¢ level, found to be the appropriate public-convenience-and-necessity price at which the gas should enter the interstate market (R. 549-93, 606-17). Other preliminary procedural orders dealing with ODECO's application, *en masse* with those of other producers are found at R. 395-405, 409-22, 428-30, 447-51 and 491-540 (Examiner's decision).

Beyond these general orders and opinions, the record presented to this Court in No. 26 contains no facts, either substantive or procedural, pertaining to ODECO's individual applications or contractual arrangements.

Further background relevant to the appeal in No. 26 is set forth in the Statement of the Case in the Brief for Petitioners, The United Gas Improvement Company, Long Island Lighting Company and Philadelphia Electric Company in their consolidated appeal in No. 21.

On appeal by ODECO to the Court of Appeals for the Fifth Circuit the court upheld the power of the Commission to impose the refund condition, albeit substituting its own "open end" refund formula for the initial public convenience and necessity rate standard used by the Commission. ODECO's petition to this Court in No. 26 questions the power Section 7 confers on the Commission.

ARGUMENT.

Section 7 of the Natural Gas Act Confers on the Commission the Authority, Exercised Here, to Condition the Issuance of a Permanent Certificate at the Appropriate Price on the Producer's Returning Excess Charges Previously Collected Under Invalid, Court Reversed Certificates.

The original § 7(c) of the Natural Gas Act provided that it was "the intention of Congress that natural gas should be sold in interstate commerce for resale for ultimate public consumption . . . at the lowest possible reasonable rate consistent with the maintenance of adequate service in the public interest." 52 Stat. 825. Construing this expression of Congressional intent, this Court has held that § 7, even as subsequently amended, and the whole Act as well were "so framed as to afford consumers a complete, permanent and effective bond of protection from excessive rates and charges." *Atlantic Ref. Co. v. Public Service Comm'n*, 360 U. S. 378, 388. And such consumer protection must "be *from the time the gas first enters interstate commerce.*" *Atlantic Ref. Co. v. FPC*, 316 F. 2d 677, 679 (D. C. Cir. 1963). (Emphasis added.)

The present petition of ODECO in No. 26 raises the special question of the application of these unequivocal principles to a proceeding in which the Commission, attempting to discharge its duty under § 7 of the Act to determine the appropriate initial price, commits error at one stage of the hearing—but, before its action becomes final under § 19, a timely appeal leads to reversal of the error. Obviously when the Commission properly performs its duties under the Natural Gas Act, it offers the sort of consumer protection contemplated by the Act and required by this Court. When it errs, however, two distinct threats to the consumer interest arise. The first is the substantive

error itself. That can only be corrected by an immediate appeal to the courts under § 19 of the Act, to reverse the erroneous action, and such an appeal was taken in the present case, laying bare the Commission's error. *Public Service Comm'n v. FPC*, 287 F. 2d 146 (D. C. Cir. 1960).

The second threat arises from the procedural delay inevitably caused by the mechanical process of correcting error through court appeal. This delay may, as in the present case, consume several years. The question raised by Petitioner in No. 26, therefore, is whether the fact of procedural delay can be allowed under § 7 to have adverse substantive impact upon consumers.

The novel thesis which lies at the base of ODECO's brief to this Court may be boiled down to the following: § 7 affords consumers "a complete, permanent and effective bond of protection from excessive rates and charges" only if and when the Commission performs without error its regulatory function with respect to the initial price of gas in interstate commerce—but should the Commission err (as shown on timely court appeal), the producer may retain any windfall which the inevitable procedural delay may generate at the expense of the consumer. In short, ODECO says that the Commission should protect the consumer—except when it fails to protect the consumer!

ODECO seeks to bolster this self-defeating construction of the Act by advancing a "sporting" theory of protecting the public interest. Thus it would make protection dependent upon the procedural skill of the legal counsel to various intervenors and would elevate the stay provision in § 19, the presence of which is explained by the protection it offers individual company respondents, to the status of a lodestar of Congressional intent to give producers the full substantive advantage of procedural delay.[1] Such an

1. Such a view ignores the fact that, while an individual company respondent may be bound by its own legal maneuvers, the public interest far exceeds and overrides the interest of any "consumer representative" intervenor. Thus, such a view would make consumer protection depend upon the ability of a petitioner to the court of

interpretation is directly contrary to the affirmative Congressional intent frequently interpreted by this Court. It is precisely when the Commission errs that the consumer most needs that protection of which this Court has spoken. The presumption implicit in the affirmative powers granted by § 7—that the Commission will exercise them properly—must be read in the light of this Congressional intent *fully* to protect the consumer. The presumption carries no negative implication that Congress intended to give the regulated company the sporting advantage of all error.

Whether the Commission acts correctly initially, or only after a reversal by the Court of Appeals, the issue before it in a § 7 proceeding remains the same—the appropriate price at which the gas is *initially* to enter the interstate market. There is no basis in the Act or in the cases for ODECO's argument at page 12 of its brief that the proper issue is the appropriate price at which such gas should be sold *after* the Commission has decided all § 7 issues correctly. The statutory limitation to prospective action only, under § 5 of the Act, takes effect only after the producer has obtained a valid, final permanent certificate no longer subject to court review. Prior thereto the producer who attempts to proceed under a certificate not final under § 19 and challenged by court appeal acts at its

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appeals to convince a court that the "extraordinary relief" of a stay is required. For obviously, the same legal result must follow in the case where counsel feels the court would not grant a stay and he therefore does not apply for one, as in the case where the application is made but denied. Under ODECO's theory, if the individual petitioner failed, in the ten to fifteen minutes without record usually allotted to motions for stays, to convince the court that petitioner would prevail on appeal, the admitted interest of all consumers would be automatically sacrificed. For if petitioner fails to make such a showing he is not entitled to a stay. *Virginia Petroleum Jobbers Ass'n v. F. P. C.*, 259 F. 2d 921 (D. C. Cir. 1958). Subsequently, however, on a fuller argument the petitioner might be able to demonstrate to the court on the record the Commission's error. The producer, in contrast, had full power to delay sale of the gas until it received a permanent certificate not subject to court review. See footnote 4, *infra*.

peril, the same as any litigant who relies upon a lower court judgment, while review is pending. *Cf. Public Service Comm'n v. F. P. C.*, 329 F. 2d 242 (D. C. Cir. 1964), *cert. denied*, 377 U. S. 963; *Delta Air Lines, Inc. v. CAB*, 280 F. 2d 636, 640 (D. C. Cir. 1960), *cert. denied*, 364 U. S. 870; *Pan American Petroleum Corp. v. Kansas-Nebraska Natural Gas Co.*, 297 F. 2d 561 (8th Cir. 1962).

The precise question of the substantive impact of procedural delay in § 7 proceedings has been considered several times by the courts of appeals. They have been unanimous in holding that Congress gave the Commission power to protect the consumer through recapture of overcharges (with interest) whenever the fact of procedural delay would have the substantive effect of depriving the consumer of full protection from excess rates for any substantial period while litigation of the initial price issue was pending —either on remand or as the result of the *ex parte* issuance of temporary certificates. In *Public Service Comm'n v. FPC*, 329 F. 2d 242 (D. C. Cir. 1964), (*"Skelly"*), the court specifically rejected, in the context of temporary certificates, the very interpretation of the Act urged by ODECO at pp. 9-12 of its brief. It clarified Judge Skelly Wright's language in the earlier *Atlantic* case,[2] relied on by ODECO, as follows:

> "Coming to the merits the producer intervenors say a refund condition is beyond the Commission's statutory powers. As to this we may say initially that our statement in Atlantic Ref. Co. v. F. P. C., 115 U. S. App. D. C. 26, 316 F. 2d 677, 679 (1963), that there is no mechanism for refund of overcharges under Section 7 is not a holding that a refund may never be required when a permanent certificate takes over from a temporary one, an issue not there considered." (pp. 248-49)

2. *Atlantic Ref. Co. v. FPC*, 316 F. 2d 677 (D. C. Cir. 1963).

and held:

> "As we have indicated, to order refund of rates found to be excessive is not an unusual remedy; and it is not unavailable under the Natural Gas Act due to the fact that in some instances the parties are not explicitly notified early in the proceedings that such a remedy may be imposed." (p. 250)

Thus the court confirmed the Commission's power under § 7 to order refunds as a means of protecting the consumer from Commission error committed at an early stage of its determination under § 7 of the Act. Such a construction of the Commission's conditioning power under § 7 is in accord with decisions of this Court in analogous areas giving broad practical scope to the Commission's authority. *Atlantic Ref. Co. v. Public Service Comm'n*, 360 U. S. 378 (initial price); *FPC v. Hunt*, 376 U. S. 515 (moratorium); *cf. FPC v. Texaco*, 377 U. S. 33 (indefinite escalation provisions).

In *Hunt Oil Co. v. FPC*, 334 F. 2d 474 (5th Cir. 1964), the Fifth Circuit affirmed an order of the Commission imposing a refund obligation under § 7 upon the producer-applicant there involved. That case followed a court reversal of an earlier Commission order, similar to those in the present case, reached in a proceeding from which the Public Service Commission of New York had been excluded as an intervenor. On remand the Commission vacated the permanent certificates issued in the proceeding from which the Public Service Commission was excluded and issued in their place temporary certificates containing a refund obligation. This action was challenged by the producer, but, affirming the Commission action, the court held:

> "The Supreme Court, in Federal Power Commission v. H. L. Hunt et al., *supra*, clearly indicates that the Commission's authority in issuing temporary certificates is broad enough to subject such certificates to any reasonable condition to protect the public inter-

est. Certainly the refund provision in the temporary certificates in suit is such a condition. Actually, as in CATCO, 27 FPC 96 (1962), *the Commission,* by declaring the original § 7 certificate void *ab initio, might have imposed a refund obligation back to the date of the initial deliveries.* Instead, the Commission here merely treated the certificates as voidable and vacated them, thus limiting the refund in the temporary certificates to the date of their authorization, November 2 ,1961." (Emphasis added.) (p. 479)

In *Texaco Inc. v. FPC,* 290 F. 2d 149 (5th Cir. 1961), the court was faced with a challenge to the Commission's ordering of interest on certain refunds. The court held:

> "We also conclude that the Commission was fully authorized, when ordering a refund under the terms of the condition, to require payment of interest at 6 percent. See Mississippi River Fuel Corp. v. F. P. C., 108 U. S. App. D. C. 284, 281 F. 2d 919. Any other holding would, it seems to us, validate a retention of funds by the producer in a manner that would amount to unjust enrichment." (p. 157)

The decision of the court below that the Commission has power to protect the consumer from past error, corrected through court review, by conditioning certificates on the refund of overcharges, was directly in line with these decisions and must be affirmed. To hold otherwise would give ODECO not only the full benefit of the Commission's earlier error—"unjust enrichment"—but confer on it a complete exemption from regulation for a period of some five years.[3] Congress clearly did not intend such a result.

The Commission's power, discused above and upheld by the courts, to protect consumers during the procedural interval in which prior error in a § 7 proceeding is corrected, is entirely different from the power to order reparations of effective rates no longer subject to correction under

3. The Commission's original Opinion 327 unconditionally certificated ODECO's application as proposed.

§ 19 of the Act which are later found to be excessive, in independent Commission proceedings under §§ 4 or 5. The Commission sets forth this distinction in *Catco*-on-remand, 27 FPC 96, 592, at 596 (1962), a case in which it made effective the consumer protection required by this Court and which it followed in the proceeding below. It there said:

> "We are not awarding reparations, in the sense of investigating an effective rate, finding it unlawfully high and ordering a refund; we are reissuing a certificate of public convenience and necessity in place of the certificate issued in June 1957, but with a price condition which in our opinion is consistent with the mandate of the Supreme Court."

ODECO in 1959 was not, like an existing transit or power utility, performing a service at a given rate which the Commission changed as the result of a new, independent rate investigation proceeding. Rather, ODECO was offered a certificate before it began any service. Thereafter, although it knew the certificate was not final under § 19 and was subject to review and vacation, and although its contract with Hope permitted it to await a final certificate,[4] no longer subject to court review, it began service for its own private business reasons. In other words, even though ODECO had been issued a permanent certificate it had *no* obligation to perform thereunder if such certificate might be upset on appeal. Such a situation is entirely different from that of a telephone company, for example, which is allowed a new rate increase. The telephone company *does* have the continuing duty to render telephone service, even

4. Petitioner in No. 26 has failed to include in the joint appendix which constitutes the record before this Court data relating specifically to its own operations or contractual arrangements. However, ODECO's contract with Hope may be presumed to be typical of similar contracts (see, *e.g.*, R. 75), giving ODECO an absolute right to cancel its obligations to Hope if it failed to obtain a final, nonappealable certificate by the middle of 1959. The brief of the Government at p. 50 in Nos. 21, 22, 26 and 32 confirms this presumption of typicalness.

if its current tariff is not final because of a timely review in an appeals court. By beginning service herein ODECO voluntarily subjected itself, at the least, to "any reasonable conditions" to its interstate sale which the Commission might in its discretion impose in conformity with the Act and the opinion of the remanding Court of Appeals.

CONCLUSION.

For the foregoing reasons this Court should affirm the holding of the court below that the Commission has power to order refund of excesses collected under certificates reversed on timely appeal to the courts.

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Dated: September 23, 1965

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IN THE

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OCTOBER TERM, 1965

No. 26

OCEAN DRILLING & EXPLORATION COMPANY, *Petitioner*,

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FEDERAL POWER COMMISSION, PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, THE UNITED GAS IMPROVEMENT COMPANY, LONG ISLAND LIGHTING COMPANY, *Respondents*.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK

QUESTION PRESENTED

Where, prior to completion of timely appeal proceedings challenging the Federal Power Commission's issuance of a certificate of public convenience and necessity, a natural gas producer elects to commence service under the certificate, which later is held invalid on the ground that the initial price thereunder is excessive, does the Commission, on remand, have power

to condition a properly priced certificate to require refunds of the excess amounts collected by the producer under the invalid certificate?

STATEMENT

On August 10, 1959, the Federal Power Commission, over the objection of the Public Service Commission of the State of New York, issued unconditional certificates to twenty-one gas producers—including Ocean Drilling & Exploration Company (ODECO), petitioner in No. 26—authorizing the producers to commence the sale of natural gas from Southern Louisiana fields at initial prices of 23.55¢ per Mcf to Hope Natural Gas Company, an interstate pipeline serving the Northeast, *Texas Gas Transmission Co.*, Op. 327, 22 FPC 378. On appeal, the Commission's action was reversed, *Public Service Commission of New York* v. *F.P.C.*, 287 F.2d 146 (D.C. Cir. 1960), cert. denied, *Hope Natural Gas Co.* v. *Public Service Commission of New York*, 365 U.S. 880 (1961), *Shell Oil Co.* v. *Public Service Commission of New York*, 365 U.S. 882 (1961), and the case was remanded to the Commission in April 1961.

In the meantime, however, and notwithstanding the pendency of the appeal, ODECO and the other producers had elected to commence service and were collecting the high initial price that was the basis for the legal attack on, and judicial invalidation of, the certificates. Following hearings on remand, the Commission, on July 23, 1963, determined that the maximum initial price at which these sales should have been certificated was 20¢ per Mcf, and to give effect to this finding it issued new certificates at that level and directed the producers to refund all amounts in excess

of 20¢ per Mcf which had been collected under the original, judicially invalidated certificates. Since ODECO had, during the pendency of the appeal and of the remanded proceedings, sold some 10,000,000 Mcf of natural gas at the 23.55¢-per-Mcf price pursuant to the invalid 1959 order, the Commission's order on remand would require ODECO to refund approximately $350,000 of the $2,350,000 it had collected prior to July 23, 1963 from its purchaser, Hope Natural Gas Company.[1]

On appeal by ODECO and others, the Court of Appeals for the Fifth Circuit, while reversing other aspects of the Commission's order, held that on remand the Commission had power to require refunds of "the fruits obtained under an invalid, that is illegal, order." *Callery Properties, Inc.* v. *F.P.C.*, 335 F.2d 1004 at 1019.

ARGUMENT

INTRODUCTION

By implication at least, ODECO seems to concede (1) that if the accepted principles of restitution apply, ODECO would be required to repay the excess moneys received under the judicially invalidated 1959 order, and (2) that if in the circumstances of this case the Commission had the power to provide for refunds, the Commission did not abuse its discretion in exercising that power here.

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[1] ODECO's 23.55¢ charges to Hope were fully reflected in Hope's rates, and Hope is obligated to flow through to its customers any refunds and reductions it obtains from ODECO. See *Hope Natural Gas Co.*, 28 FPC 958 (1962).

But, says ODECO, the Commission lacks express power under the Natural Gas Act to require refunds,[2] and no such power need be implied here in order to protect the consumer, since the New York Commission, as the successful petitioner in the first-round appeal, could have assured its right to refunds by obtaining a stay pending appeal in the Court of Appeals for the D.C. Circuit.

Before responding to ODECO's arguments, we would like to set forth the doctrine from which ODECO asserts it should be exempted. Section 74 of the ALI Restatement of Restitution provides:

> "A person who has conferred a benefit upon another in compliance with a judgment, or whose property has been taken thereunder, is entitled to restitution if the judgment is reversed or set aside, unless restitution would be inequitable or the parties contract that payment is to be final; if the judgment is modified, there is a right to restitution of the excess."

We do not understand ODECO to contend that the Commission's 1959 order was not reversed or set aside—or at least modified—by the D.C. Circuit. We do not understand ODECO to contend that it has contracted with the New York Commission or with the consumers it represents that the payments were to be final. And we are unable to find in ODECO's brief any

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[2] Throughout its brief, ODECO refers to the refunds required by the order on remand as "retroactive refunds". Whatever the merits of this phrase as an emotional slogan, it is not a logical, or even a grammatical, concept: all refunds are retroactive (one wonders what "prospective refunds" would be), and while it may be argued that refunds are, in effect, retroactive rate reductions, this would, at best, make the term "retroactive refunds" a redundancy.

suggestion that refunds would be inequitable—unless the alleged "need for certainty" (Br. 20-21, 37) is interpreted as an equitable defense.[8]

I. The Commission Had Power, on Remand, to Require Refunds of the Excess Amounts Collected Under the Prior Judicially Reversed Order

So far as we are aware, it has been the Federal Power Commission's uniform practice, where consumer-type appeals have resulted in reversal of prior Commission orders which had approved increased rates under Section 4 or which had authorized contested initial rates under Section 7, to require, in ultimately disposing of the case on remand, that the proper rate be made effective as of the date it would have been effective had the Commission not erred the first time around (i.e., in a Section 4 proceeding, from the date the increased rate became effective, and in a Section 7 proceeding, from the date deliveries commenced). In all cases, this *nunc pro tunc* effect has been achieved by requiring refunds of excess moneys collected pursuant to the invalidated order.

Rate increase cases where refunds on remand were ordered are *Panhandle Eastern Pipe Line Co.*, Op. 269, 13 FPC 53 (1954), rev'd, *City of Detroit* v. *F.P.C.*, 230

[8] In discussing its desire for certainty, ODECO emphasizes that it is a "small producer" (Br. 21; see also Br. 3). While we think it clear that the Commission's order was valid for both large and small producers, ODECO's smallness is open to question. Moody's Industrial Manual, June 1965 edition, reveals (p. 2272) that in 1964 ODECO had assets of $35,234,734, revenues of $13,999,364, and after-tax profits of $2,174,459. The same source further reveals (pp. 2270-71) that ODECO is controlled by Murphy Oil Company, with whom it shares a number of officers and directors, and that in 1964 Murphy had assets of $175,497,491, revenues of $154,928,560, and profits of $4,253,824.

F.2d 810 (D.C. Cir. 1955), cert. denied, 352 U.S. 829 (1956); on remand, *Panhandle Eastern Pipe Line Co.*, Op. 269-A, 25 FPC 784 (1961), rev'd in part, *Panhandle Eastern Pipe Line Co.* v. *F.P.C.*, 305 F.2d 763 (D.C. Cir. 1962), cert. denied, 372 U.S. 916 (1963); on further remand, *Panhandle Eastern Pipe Line Co.*, Op. 269-B, 32 FPC 634 (1964), aff'd, *Panhandle Eastern Pipe Line Co.* v. *F.P.C.*, 348 F.2d 340 (D.C. Cir. 1965); *Shamrock Oil & Gas Corp.*, Op. 332, 22 FPC 882, rev'd, *Minneapolis Gas Co.* v. *F.P.C.*, 294 F.2d 212 (D.C. Cir. 1961); on remand, *Shamrock Oil & Gas Corp.*, 26 FPC 943 (1961). See also *Atlantic Seaboard Corp.*, Op. 368, 28 FPC 860 (1962), rev'd, *Lynchburg Gas Co.* v. *F.P.C.*, 336 F.2d 942 (D.C. Cir. 1964); on remand, *Atlantic Seaboard Corp.*, 33 FPC —. (Jan. 28, 1965).

Certificate cases where refunds on remand were ordered include *Catco* on remand—*Continental Oil Co.*, Op. 351, 27 FPC 96 (1962)—and the Socony Mobil portion of *Transco-Seaboard*[4]—*Socony Mobil Oil Co.*, 27 FPC 347 (1962). See also *Texaco Inc.*, 28 FPC 247 (1962), and orders set forth at R. 477-90.

It should be noted that in none of the above cases did the consumer representatives, who were the successful petitioners in the original appeals, seek a stay of the Commission's orders pending appeal.

In fact, ODECO cites no case, either under Section 7 or Section 4, where, following a successful consumer attack on a prior FPC order, the Commission, on

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[4] *Transcontinental Gas Pipe Line Co.*, Op. 315, 20 FPC 264 (1958), aff'd sub nom. *United Gas Improvement Co.* v. *F.P.C.*, 269 F. 2d 865 (3rd Cir. 1959), summarily rev'd sub nom. *Public Service Commission of New York* v. *F.P.C.*, 361 U.S. 195 (1959).

remand, has waived refunds. Nor does ODECO point to any case in which a court has set aside an FPC order on remand requiring refunds. Instead, ODECO cites (a) a line of federal cases which hold that where a regulated company has collected rates pursuant to a valid commission order, the commission may not thereafter require refunds on a showing that the rates were excessive, and (b) two state court cases in which it was held that under the state statutes there involved refunds could not be required of moneys collected, pursuant to an invalidated rate increase order, during the pendency of review proceedings.

As to the former—the so-called "filed rate" doctrine —both the Commission and the court below correctly pointed out that the doctrine has applicability only where the filed rate is itself final:

> "Our unconditional certificate orders under Section 7 were erroneously issued in the first place and as a result [of the earlier timely appeals] have never assumed finality." 27 FPC 482 at 483; R. 411.
>
> "It is one thing for a Court to rule that under a valid certificate the Commission lacks the power to retrospectively review rates and impose retroactive refund orders. It is quite another for a Court to conclude that a Commission lacking the power to do the former may yet not have inherent power to recapture the fruits obtained under an invalid, that is illegal, order. Thus ... refunds are proper." 335 F.2d at 1019; R. 638-39.

Although the instant case appears to be the first in which a natural gas company has challenged the Commission's power to require refunds of excess amounts collected under a prior Commission order which has

been judicially reversed, there is a helpful analogy provided by *Public Service Commission of New York* v. *F.P.C.*, 329 F.2d 242 (D.C. Cir. 1964), cert. denied sub nom. *Prado Oil & Gas Co.* v. *F.P.C.*, 373 U.S. 963. There, the New York Commission had appealed the FPC's failure, upon permanent certification, to order refunds of excess amounts collected pursuant to temporary certificates not containing an express refund condition. A group of producers, intervening in support of the Federal Power Commission's action, raised the "filed rate" doctrine urged here by ODECO; in holding the doctrine inapplicable, Judge Fahy stated:

> "The producers argue that in any event refunds may not be required because the Commission lacks power 'to set retroactive rates or award reparations,' citing Hope Natural Gas Co. v. F.P.C., 134 F.2d 287, 309-310 (4th Cir. 1943), rev'd on other grounds, 320 U.S. 591, 64 S. Ct. 281, 88 L. Ed. 333 (1944). But there the Court was referring to the power of the Commission with respect to rates which had become unconditionally effective when filed, subject to being changed only prospectively in a proceeding under Sections 4 or 5 (a) of the Act. The Court was not ruling upon the power of the Commission to condition a permanent certificate by requiring refunds of excessive prices charged and received under temporary certificates. We think it is clear that a refund can be required when the temporary certificate is so conditioned. The serious question is whether it can be required when the temporary certificate is not so conditioned.
>
> "As to this the Commission itself, though it did not require refunds in these cases, does not disclaim the power. *The basic purpose of the Natural Gas Act is consumer protection from unreasonable prices, and refund of excessive utility rates is a*

> *well recognized remedy. It would need to be quite clear from the Act that the Commission lacked the power to use such a remedy for the courts to deny it. We find no such clarity.* The power does not depend upon an explicit refund provision in a temporary certificate. Should the occasion be appropriate for its exercise the power resides in the Commission when it grants a permanent certificate. To hold that it may not then require refund of excessive prices previously permitted without notice or hearing or mature consideration, since the Commission acted on an emergent and temporary basis, would be inconsistent with the regulatory responsibility of the Commission to aid in the ascertainment and authorization of just and reasonable rates." 329 F. 2d at 249 (footnote omitted; emphasis added).

The two state court cases cited by ODECO—*Keco Industries, Inc.* v. *Cincinnati & Suburban Bell Telephone Co.*, 166 Ohio St. 254, 141 N.E. 2d 465 (1957), and *Mandel Bros., Inc.* v. *Chicago Tunnel Terminal Co.*, 2 Ill. 2d 205, 117 N.E. 2d 774 (1954)—are clearly distinguishable.[5] First of all, of course, these decisions turned on the particular wording of the statute involved. As the very portion from *Keco* quoted by ODECO (Br. 25) shows, the Ohio court thought its ultimate result a proper one because the consumer's failure to recoup excess payments was balanced by the fact that, in Ohio, "a utility may not charge increased rates during proceedings before the commission seeking same and losses sustained thereby may not be recouped." But the same is decidedly not true under the

[5] Although ODECO introduces these two cases with an "e.g." symbol (Br. 24), they are apparently the only cases reaching this result. See *Pacific Telephone & Telegraph Co.* v. *Public Utilities Commission*, 44 Cal. 1, 401 P. 2d 353 at 364 (1965).

Natural Gas Act; under Section 4, a natural gas company may place in effect and collect its higher rates pending the outcome of the rate proceeding. As the quoted passage suggests, and as the passage which follows the quoted portion (not set forth by ODECO) makes perfectly clear, the rationale of the Ohio court's holding was that the Ohio legislature intended that a rate order of the Ohio Public Utilities Commission "stands on a different footing than the judgment or order of a court of law", 141 N.E. 2d at 469. The harsh and unfortunate results produced by *Keco* are illustrated by *City of Columbus* v. *Public Utilities Commission,* 170 Ohio St. 105, 163 N.E. 2d 167 (1959), where the Ohio Supreme Court, in a 4-3 decision, held that the Ohio statute did not permit a reviewing court to grant the type of stay which ODECO contends (Br. 28) that New York should have obtained in the first-round appeal here; both the majority and the dissent suggest the need for corrective legislation in Ohio.

Moreover, in both *Keco* and *Mandel*—in direct contrast to the present case—the commission on remand had *declined* to order refunds, and the state courts were sustaining the commission's action. Finally, both decisions involved rate increases—in contrast to the initial prices involved in the present case—and in *Mandel* the Illinois court specifically noted that a different result would have obtained had initial prices been involved, 117 N.E. 2d at 776.

II. The New York Commission's Failure to Seek a Stay in the First-Round Appeal Gave No Rights to ODECO

Seeking to avoid the charge that its retention of the excess moneys collected during the three-and-a-half years between initial delivery under the invalid order and the ultimate order on remand would, contrary to

the intent of Congress, "provide a windfall for the natural gas company with a consequent squall for the consumers",[6] ODECO argues (Br. 22-29) that Congress provided a specific and "exclusive" remedy to prevent such a windfall—the stay procedure in the first-round appeal—and that since the New York Commission failed to avail itself of this "exclusive" remedy, the Federal Power Commission erred in following the course it did (i.e., in ordering refunds).

ODECO's argument is without substance. The function of a stay pending appeal is not to determine the ultimate rights as between the parties—that, obviously, is the function of the decision on the merits—rather it is to provide interim relief in those situations where the equities require it. Clearly a stay is extraordinary relief, and it was almost certainly not available to the New York Commission in the earlier appeal; at any rate, a stay is not designed, as ODECO would have it (see Br. 28-29), to protect the party relying on the judgment under attack. Further, ODECO has shown absolutely no prejudice—not even hypothetical prejudice—from the fact that New York did not seek a stay.

The leading case on the availability and purpose of a stay is *Virginia Petroleum Jobbers Ass'n* v. *F.P.C.*, 259 F. 2d 921 (D.C. Cir. 1958)[7]—discussed by ODECO

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[6] *Atlantic Refining Co.* v. *Public Service Commission of New York (Catco)*, 360 U.S. 378 at 390 (1959).

[7] The *Virginia Jobbers* decision has been followed by the Courts of Appeals for the Second, Fourth, and Tenth Circuits, *Eastern Air Lines, Inc.* v. *C.A.B.*, 261 F. 2d 830 (2nd Cir. 1958); *Airport Comm'n of Forsyth County* v. *C.A.B.*, 296 F. 2d 95 at 96 (4th Cir. 1961); *Associated Securities Corp.* v. *S.E.C.*, 283 F. 2d 773 at 774-75 (10th Cir. 1960). See also *Armour & Co.* v. *Freeman*, 304 F. 2d 404 at 406, 408, 418 (D.C. Cir. 1962).

at Br. 27-28—where the court held that a stay was extraordinary relief whose issuance was influenced by four factors:

> "(1) Has the petitioner made a strong showing that it is likely to prevail on the merits of its appeal? Without such a substantial indication of probable success, there would be no justification for the court's intrusion into the ordinary processes of administration and judicial review. (2) Has the petitioner shown that without such relief, it will be irreparably injured? The key word in this consideration is *irreparable*. Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm. . . . (3) Would the issuance of a stay substantially harm other parties interested in the proceedings? . . . (4) Where lies the public interest?" 259 F. 2d at 925 (emphasis in original).

Although concluding that petitioner had shown "a probability of success on the merits of its appeal", the court in *Virginia Jobbers* nonetheless denied the stay because petitioner had failed to show irreparable injury in that, on reversal and remand, petitioner could be made whole. *Id.* at 926. While noting that the "question of harm to others if a stay were granted is not really before us", the court went on to observe that

> "the gas companies [whose certificates were under review by petitioner] must be aware that they are now proceeding at their own risk, and without a claim for relief from them, it is neither the petitioner's nor the court's place to protect them

from hypothetical, self-inflicted losses."[8] *Id.* at 927.

Even in a case where a stay would seem peculiarly appropriate—on appeal of an FPC order authorizing a pipeline to abandon its long-standing service to a major customer—the D.C. Circuit vacated its stay with a warning that the parties relying on the order under review would be acting "at their own risk until final disposition of the case." *Michigan Consolidated Gas Co.* v. *F.P.C.*, 283 F. 2d 204 at 209 n. 3 (D.C. Cir. 1960), cert. denied, 364 U.S. 913.

ODECO asserts (Br. 36) that New York's failure to seek a stay marked a departure from "the procedure commonly used by litigants contesting Commission orders". The statement is deceptive. Obviously, where the Commission reduces a rate and the natural gas company appeals, a reviewing court will frequently stay the reduction and refund, so that the fund in dispute will not disappear pending the outcome of the appeal. But where the consumer appeals from a Commission order *failing* to reduce rates, there is no danger that the fund will disappear, and we know of no cases—and ODECO cites none—where a consumer petitioner has received or even sought a stay pending appeal of a Commission rate order.

ODECO's contention that it was somehow prejudiced by New York's failure to request a stay is clearly without merit. ODECO takes the position (Br. 28)

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[8] In this case ODECO's "losses" are, of course, nothing more than the requirement that *excess* amounts, as measured by the in-line level, be refunded. ODECO will still retain 20¢ per Mcf for all gas delivered under the invalid certificates—a price double the 1954 levels, and one substantially in excess of the average unit revenues of the producing industry today.

that the type of stay that would have been appropriate (1) would have permitted the sales to continue, just as if there were no stay, (2) would have permitted ODECO to collect the 23.55¢-per-Mcf price pending appeal, just as if there were no stay, but (3) would have required ODECO either to pay the moneys collected into escrow or expressly to agree to refund any excess upon the outcome of the litigation. Such a "stay", we submit, would be meaningful, and obtainable, only in the case of a potentially bankrupt natural gas company, which ODECO assuredly is not. ODECO's claim that it would, upon issuance of such a stay, "have been permitted to make an informed determination of whether to dedicate its gas to interstate commerce on such terms and conditions" (Br. 28) is disingenuous; ODECO had commenced service on December 4, 1959, five days *before* New York's petition for review was filed in the D.C. Circuit (and we do not understand ODECO to challenge the Commission's consistent rule that once service has commenced, it may not thereafter be discontinued for any reason, absent FPC approval under Section 7(b)). Thus ODECO was in no way prejudiced by the absence of the type of stay it contends should have been issued as a prerequisite to refunds.[9]

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[9] For similar reasons, there is no merit to ODECO's contention (Br. 30-37) that, following the remand, the Commission should have vacated the original certificates and issued temporary certificates containing a refund provision—the procedure followed in the remanded *Catco* and *Socony Mobil* proceedings. Here again, had the Commission followed the procedure recommended by ODECO, ODECO would have had no option to accept or reject. But even more significant, perhaps, is the fact that in the remanded *Catco* and *Socony Mobil* cases the Commission ordered refunds of all excess amounts collected, without regard to whether the excesses were collected before or after the refund-provision temporary certificate had replaced the original unconditioned permanent certificate. *Continental Oil Co., supra,* 27 FPC at 109-10; *Socony Mobil Oil Co., supra,* 27 FPC at 349.

Finally, in view of ODECO's heavy reliance on the availability of a stay from the D.C. Circuit in the original review proceedings, it seems unfortunate that ODECO chose to take its appeal to the Fifth Circuit, thus eliminating the possibility that the initial reviewing court might clarify its position regarding a stay in these circumstances. As this Court recently remarked in a similar situation:

> "[I]n light of the fact that this case followed two different routes of appeal, thus eliminating the possibility that the initial reviewing court would clarify the extent of its mandate . . . it is appropriate to resolve doubts about the construction of the initial mandate in the Commission's favor." *United Gas Improvement Co.* v. *Continental Oil Co.*, 381 U.S. 392 at 405 (1965) (footnote omitted).

CONCLUSION

The decision of the court below, insofar as it sustained the Federal Power Commission's power to order refunds of excess moneys collected under the original invalid certificate, should be affirmed.

Respectfully submitted,

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October 1, 1965

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

Nos. 21, 22 and 32

THE UNITED GAS IMPROVEMENT COMPANY, ET AL.,
Petitioners,
v.
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PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
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v.
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PETITION FOR REHEARING OF THE SUPERIOR OIL COMPANY, J. R. FRANKEL, ET AL., AND J. RAY McDERMOTT & CO., INC.

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Petitioners herein, designated "Superior" for convenience, petition this Honorable Court for rehearing of its decision and judgment rendered herein December 7, 1965. This decision puts the gas producing industry in an administrative straitjacket, which undoubtedly will hamper expansion and even imperil its life.

*R. R. Frankel, L. R. Frankel, Mae Frankel Shalett, H. T. Shalett, and the Estate of Maurice Frankel, dec'd.

A. This Court erred in reversing the court below.

1. The plight of the gas industry is most serious and its prospects are dark indeed. In *Federal Power Commission* v. *Texaco Inc.*, 377 U.S. 33, this Court held that the Commission might by rule preclude hearing of any application based on a contract with indefinite pricing. The rule was held to prescribe only qualifications for an applicant without reaching the merits of the application, and such applicant could always seek waiver of the rule. The basis of the holding was to reduce the administrative burden of a "vast proliferation of hearings". In *Federal Power Commission* v. *Hunt*, 376 U.S. 515, this Court held that the Commission, without any hearing under Section 7, might condition downward a price in a temporary authorization and preclude any price increase for the period of temporary authorization. This, because of the "broad discretionary power in the Commission to condition temporary certificates • • • vital to its ability to hold the line in pricing." Here it is held that a Section 7 hearing for a *permanent* certificate by a *qualified applicant* need not involve consideration of relevant evidence bearing on present or future public convenience and necessity but may be limited to a showing of only the level of prices at which "substantial amounts" of gas have been certificated in other proceedings,[1] so long as they are not subject to judicial review or "in any way suspect" because consideration of all relevant evidence would be an administrative burden and require a "considerable expenditure" of Commission manpower. It is respectfully submitted that with this series of cases, Section 7 of the Natural Gas Act which requires a hearing on all applications, and which requires certification of any qualified applicant proposing a service shown at the hearing to

[1] Applicants' participation or not, the evidence, or other considerations, in such proceedings apparently are immaterial.

be required by present or future public convenience and necessity, has been emasculated on the sole basis of administrative convenience and discretion.

2. The present holding is contrary to the requirements of the Natural Gas Act[2], the Administrative Procedures Act[3], and violates due process of law and the taking of property for public use without just compensation protected by the Fifth Amendment to the Constitution.

This Court held in *Atlantic Refining Company* v. *Public Service Comm. of New York,* 360 U.S. 378, 391 (Catco), that "Section 7(e) requires the Commission to evaluate all factors bearing on the public interest", which holding was re-announced in *Federal Power Commission* v. *Transcontinental Gas Pipe Line Corporation,* 365 U.S. 1, 8. The latter case further held that the Commission's powers under Section 7 are limited to a veto of certificate applications exercisable only when "a balance of all the circumstances weighs against certification", Pg. 17. If these decisions have been overruled as to the Commission's obligations under Section 7, action of such consequence to the Commission and the gas industry should be explicitly stated rather than left to implication.

If the rule, i.e. "There is no statute that can be held to limit as suggested trial of an issue of confiscation" announced by this Court in *Baltimore & Ohio R. Co.* v. *United States,* 298 U.S. 349, 363, is not applicable to the Natural Gas Act, and this Court's holding in *Federal Power Commission* v. *Natural Gas Pipeline Company of America,* 315 U.S. 575, 583, i.e. "The first prerequisite to an order of the Commission is that it shall be preceded by a hearing and

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[2] 15 U.S.C. 717-717w.

[3] 5 U.S.C. 1001-1011, Sec. 1009(e).

order" does not mean the full and fair hearing contemplated in *Morgan* v. *United States,* 304 U.S. 1, all parties should be so advised. If the administrative burden of quasi-judicial hearings under the Natural Gas Act is to be removed by employment of administrative expertise and convenience, it is earnestly prayed that the Court clearly so hold in order that the gas industry may reasonably plot its future course.

3. That this is a so-called "interim measure" is difficult to perceive. The order and judgment here are permanent. The Superior Oil Co. alone is required to refund permanently and forever over 8 Million Dollars. *Solely to accommodate administrative convenience and on the basis of nothing more than Commission expertise,* Superior individually is precluded from receiving its contracted prices until July 1, 1967 or until just and reasonable rates for the industry, not Superior, are determined for south Louisiana. Whether these petitioners' proposed rates for these sales have been or are now required by public interest, or have been, or will be, just and reasonable as to them is not only not now to be determined but will never be considered by the Commission.

The above goes to the legal issues previously briefed, and they will not be further argued herein, but on the above basis, and the prior briefs, rehearing of the Court's decision of December 7, 1965 is respectfully prayed.

B. This Court erred in affirming the Commission's in-line price finding.

In addition to the foregoing, there is another matter determined by this Court's decision which Superior did not brief before, and which, in any event, it feels the Court's decision is in error and should be reheard. This has to do with the Court's holding that 18.5¢ per MCF is the "in-line" price level in south Louisiana.

1. Superior did not cover this point in its brief in reliance on Rule 23(1)(c) of the Court and decisions such as *Mazer* v. *Stein,* 347 U.S. 201, 208. Its position was that since this issue, i.e., the *level* of "in-line" price, was not included in the questions presented in the several Petitions for Writs of Certiorari which were granted, and was not reached by the court below, the same would not be considered. Mention of such issue in a footnote on the last page of the Commission's Petition was not believed to meet the Court's rule; however, opportunity was requested to file a supplemental brief if the Court should conclude to consider that issue. This request was not granted and therefore this belated opportunity is employed.

Initially it is to be noted that the *only evidence* in this entire record of prices contracted for, certificated or paid, is that contained in Exhibit X-42 (R. 286-298) and the related testimony of the witness, Dr. J. Rhoads Foster. Said exhibit and testimony are found at R. 281-299, both inclusive.

The holding that 18.5¢ per MCF[4] is the in-line price level appears to be based on the finding that such is supported by contract prices in south Louisiana under which *substantial amounts* of gas have been *contemporaneously certificated* and which are *not suspect;* and that it is a price necessary to prevent entrance into the interstate market at *prices higher than existing levels.* We examine below these emphasized matters and show that the holding is erroneous on this record.

2. *Substantial Amounts.* Relative to *"Substantial Amounts"* for in-line comparable price, it is assumed that

[4] Exclusive of tax reimbursement. References hereinafter to price, or initial base price, are also exclusive of tax reimbursement, which item is treated separately under that heading, unless stated otherwise.

a substantial amount of gas is one substantial in relation to the entire amount of gas sold in the period under consideration, rather than only substantial in an absolute sense. This is the approach adopted in considering that "substantial evidence" which will require affirmance of an administrative finding, i.e., it must be substantial in the light of the whole record made. Cf. *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 456, 490; *O'Leary* v. *Brown-Pacific-Maxon, Inc.,* 340 U.S. 504, 508; *United States* v. *Carlo Bianchi and Co.,* 373 U.S. 709, 714, 715.

The Examiner (R. 506) and the Commission (R. 558), after eliminating all prices above 18.5¢ per MCF as suspect, found that there were 47 contracts executed in 1957 with volumes of 56.5 M²mcf, and 59 contracts executed in 1958 with volumes of 70.5 M²mcf at initial base prices of 18.5¢ per MCF or lower. Further, that in the *Catco*[5] decision on remand (Opn. No. 351) it had been found that of contracts dated between July 1, 1954 and June 30, 1956 (prior to the original erroneous *Catco* decision in June 1957), out of total 1958 deliveries of 241.2 M²mcf, only 63.9 M²mcf were sold at prices above 18¢ per MCF. Relative to the last part of this finding, it is noted that Superior was not a party to the *Catco* case. Under this Court's holding reversing the original Commission decision, 360 U.S. 378, 393-4[6], a related proceeding record (here there is no relationship) was held wholly insufficient to support a Commission finding. If such were not the law, the data presented in the remanded *Catco* hearing (Opinion No. 351) would be totally unreliable here because the cut-off date of that data was June 1956, or a year and one-half prior to these 1958 contracts. Initial prices in 1954 contracts were

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[5] Continental Oil Co., et al., 27 FPC 592.

[6] *Atlantic Refining Company, et al.* v. *Federal Power Commission.*

no doubt considerably increased by 1958. This record does not include a specific showing on this; however, Exhibit X-42, Schedule 5, R. 295, does show that the weighted average initial price for 1958 contracts was 2.3¢ per MCF *in excess of the 18.2¢* weighted average initial price for *1956 contracts.*

Returning to the 47 contracts in 1957 and the 59 contracts in 1958 relied on by the Commission. These numbers are misleading.

In 1957 there were 116 new contracts, which covered volumes of 207.0 M²mcf. Only *17* such contracts provided initial base prices of 18.5¢ per MCF (14.66% of the number of contracts) and under these 17 contracts only 31.7 M²mcf of gas (15.3% of the volume of gas sold under 1957 contracts) was covered. By contrast, in the same year there were *29* contracts with initial base prices of 21.5¢ per MCF (25% of all contracts for that year) under which 44.5 M²mcf of gas was sold (21.5% of all volumes sold under 1957 contracts) [Exhibit X-42, Schedule 3, Col. (g) and Schedule 4, Col. (g), R. 291, 293].

In 1958 there were 139 new contracts which covered 261.1 M²mcf of gas sold. Only *26* such contracts provided initial base prices of 18.5¢ per MCF (18.7% of the number of contracts) and these contracts covered only 39.5 M²mcf of gas (15.1% of the total gas volumes). By contrast during the same year there were *43* contracts with initial base prices of 21.5¢ per MCF (30.9% of the total number of contracts) which covered 112.8 M²mcf of gas sold, or 43.2% of the total gas volumes under all 1957 contracts. [Exhibit X-42, Schedule 3, Col. (h) and Schedule 4, Col. (h), R. 291, 293.]

Certainly contracts at 18.5¢ per MCF *and lower* are not support for an 18.5¢ per MCF price line. If "and lower" contracts are to be considered at all, they must be com-

pared against all contracts at 18.6¢ per MCF and higher. Exhibit X-42, Schedule 7, Line 1, R. 297, shows this relationship. For each of the years 1957 and 1958 only 25% of total volumes of such contract vintage was sold as low as 18.5¢ per MCF and 75% of all volumes was thus at higher prices, the median prices being 20.3¢ per MCF in 1957 and 21.5¢ per MCF in 1958; 25% of all volumes for both years was sold at 21.5¢ per MCF.

No matter how approached, 1957 and 1958 contracts with 18.5¢ per MCF initial base prices, or 18.5¢ per MCF and lower, did *not* cover substantial amounts of gas relative to amounts sold under all contracts of such vintage. No theory yet announced, at least to our knowledge, has ever deemed *volumes* of gas "suspect".

3. *Suspect Prices.* It is held that "suspect" prices are not to be considered for "in-line" price determination, but what makes a price suspect has never been spelled out. It certainly behooves this Court to announce what makes a price a "suspect" price. The Commission has said all prices over 18.5¢ per MCF are suspect. Such must be a subjective reaction and is apparently so acknowledged by the Commission agreement with the Examiner's statement, i.e., "it is reasonable to *assume* that the line would have been held at 18.5¢ per MCF in a substantial portion of the *other* contracts executed in 1957 and 1958" but for the erroneous *Catco* decision in June of 1957 (R. 558, emphasis added). This so-called "reasonable" assumption is repudiated by the record. Between 1953 and 1960 the increase in the highest of south Louisiana prices was only 12.5% and the weighted average price increase was only 22%, while during this period drilling costs for new gas increased 52% (R. 284-285). The reasonable assumption *from the record* is that prices increased due to constantly increasing costs,

not because of any Commission action — erroneous or otherwise.

Further, this record shows that in 1952, 12% of all volumes contracted for that year were sold at 20¢ per MCF; in 1953, 25.7% of all volumes contracted for were sold at 20¢ per MCF; and in 1955, 17.4% of all volumes contracted for were at 20¢ per MCF. In 1956, 24.3% of all volumes contracted for were at 21.1¢ per MCF to 21.4¢ per MCF (and an additional 5.1% at 20¢ per MCF). (Exhibit X-42, Schedule 3, R. 291) All of these prices are permanently certificated and beyond review. Only by the Commission's unfounded assumption can they be deemed suspect. It cannot be argued, much less assumed, that prices certificated *through 1956* were affected by an erroneous Commission order *made eighteen months later.*

In 1957 with only 15.3% of contracted volumes at 18.5¢ per MCF, 10.9% of the volumes were at 20¢ per MCF, 20.4% at 20.1¢-20.9¢ per MCF, 10.8% at 21.1¢-21.4¢ per MCF, and 21.5% at 21.5¢ per MCF. (R. 291, *supra*) Speculation alone will permit assumption of what part, if any, of these 1957 prices were influenced or affected by the erroneous Commission decision in *Catco* in June of that year, but based on 1956 prices alone when over 30% of all gas contracted for that year was at 21.5¢ per MCF or higher, the "in-line" price must be at that level.

"Suspect" was first applied to certain prices by the Ninth Circuit Court of Appeals in *United Gas Improvement Company* v. *Federal Power Commission,* 283 F. 2d 817 (1960). There, in a case involving one of the instant sales and remanding the Commission certificate order, it was pointed out that prices in certificate orders *then* subject to judicial review were subject to modification and thus could not be relied on to determine a line of prices. It was held further:

> "Where a substantial number of certificated prices are thus under court or Commission review, like prices in the same area though not currently under review ought to be regarded as suspect"

and ought not to be relied on in fixing a line

> "except upon evidence and findings to the effect that they are not subject to the same infirmities which are under test in the pending proceedings." (Pg. 824)

The Commission, and Petitioners supporting its orders here, argue that judicial vacation of any certificated price renders all like prices "suspect", and such like prices cannot be shown to be without the same infirmities except by a showing that present reconsideration by the Commission would reach the prior result. This is, of course, not only impracticable but impossible. It would require a retrial of every case whose price is to be used in determining a price line. This burden would exceed that of determination of the "just and reasonable" rate. This very contention the Ninth Circuit in the same case expressly repudiated:

> "Where such denial of the right to participate in prior proceedings has not been judicially challenged, the fact of denial should not preclude the Commission from referring to the initial price therein certificated in the process of fixing a line in a subsequent proceeding. This is true because if not judicially challenged a Commission order excluding participation by others must be taken as correct." (283 F. 2d at 825).[7]

The statement last quoted was with specific reference to 16 schedules certificated in five separate proceedings where

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[7] The *concurrency of contest* necessary to render a price "suspect" was reiterated in a decision of the Ninth Circuit rendered since oral argument here. *People of State of Calif., et al.* v. *Federal Power Commission,* No. 19647, Nov. 9, 1965, not yet reported (Opn. P. 9).

United Gas Improvement Company (UGI) and New York Public Service Commission (New York) were denied the right to participate. In the case mentioned in the footnote, *Trunkline Gas Company, et al.* 22 FPC 110, judicial review resulted in affirmance of the Commission certificate order. *Public Service Comm. of New York* v. *Federal Power Commission* (C.A. D.C. 1960), 284 F. 2d 200.

These permanently certificated prices referred to in the Ninth Circuit Court's opinion are included on Schedule 7, Line 7 of Exhibit X-42 (R. 297). All are either no longer subject to judicial review or were affirmed on review. Under the Ninth Circuit's decision these prices particularly are "not precluded" from consideration for "in-line" pricing in subsequent proceedings. They with all other permanently certificated prices in 1957 and 1958 contracts, show a median price of 20.3¢ per MCF in 1957 and 19.0¢ per MCF in 1958 with weighted average prices for said years of 19.7¢ per MCF and 19.8¢ per MCF, respectively. This schedule also shows that 25% of the volumes sold under 1957 and 1958 contracts were at prices of 21.3¢ per MCF in 1957 and 22¢ per MCF in 1958. These are prices the Ninth Circuit Court expressly held were *not* suspect; yet they are the same prices which on remand the Commission "reasonably assumed" were suspect solely because the price exceeded 18.5¢ per MCF. On the basis of Commission certificated prices no longer subject to judicial review and not subject to modification or collateral attack, the "in-line" price in 1957-1958 must be between 21.3¢ per MCF and 22.0¢ per MCF.

The preeminence of this Court is not questioned, but we believe there was no intention here to remove the Commission from the usual agency obligation on remand to follow the directions of the remanding court. *Federal Power Commission* v. *Pacific Light and Power Co.*, 307 U.S. 156, 160,

held a remanding court's judgment to be "final and indisputable" Cf. *Interstate Commerce Commission* v. *Baird*, 194 U.S. 25, 38.

A following of an "in-line" price concept has no relation whatsoever to that of following precedent. Certainly the Commission, as this Court, is free to depart from or overrule its prior decisions. But the departing decision must still be related to the applicable law and the record evidence. The "in-line" price concept is at best an artificial formula to be objectively used. It cannot properly be juggled. Based on non-suspect orders for contemporaneous contracts, the "line" of prices must be between 21.3¢ per MCF and 22¢ per MCF.

4. *Contemporaneous Settlement Dockets.* The Commission Opinion (R. 351) shows that during and immediately preceding this hearing, the Commission in approximately 60 dockets, otherwise on all fours with the present 13 dockets, entered permanent certificate orders on a settlement basis. These orders certificated prices of 20.625¢ per MCF for sales where state severance tax is payable, and 19¢ per MCF for other sales in the south Louisiana area (see R. 477-481 for type of order). The volumes of these 60 sales is not disclosed, but undoubtedly is greater than that of the 43 sales at 18.5¢ per MCF which the Commission found "substantial". Surely it cannot be argued that these orders are "suspect" and no other orders are *as* contemporaneous. They must represent the *minimum* level of existing prices *then* being certificated. That they were settlements does not detract from the findings made that they were required by present and future public convenience and necessity. Yet, compare them with the instant order.[8] They required refund

[8] Settlement offer, R. 472-476, Commission order, R. 477-481, related to Sun Oil Co., show the settlement format.

of only ⅔ of the amounts collected prior to January 1, 1962 but Superior is required to refund 100%. They placed the refund floor at .625¢ per MCF and .5¢ per MCF higher than the refund floor fixed for Superior's sales. They provided for the identical moratorium period. These orders specifically repudiate any finding that the instant "in-line" base price is 18.5¢ per MCF. We must "reasonably assume" the Commission did not deliberately certificate "out-of-line" prices. The in-line price here could in no event be less than 20.625¢ per MCF, including tax reimbursement, for onshore south Louisiana gas, and 19¢ per MCF for offshore south Louisiana gas, based on Commission orders in other cases so similar to the instant dockets that at one time all were consolidated for hearing.

5. *Prices higher than existing levels.* The Court's opinion throughout reflects the feeling that consumer protection is adequate only if the price line is "held". Thus new gas prices should not exceed existing price levels. Accepting this, the 18.5¢ per MCF price is still not supportable on this record. It is much below existing price levels in 1957 and 1958.

If Commission expertise or its pleading[9] are deemed conclusive, in 1959 more than 84 billion cubic feet of gas was being sold *with Commission consent* at prices of 23.55¢ per MCF including tax. (R. 439). Thus, the present Commission order, and this Court's affirmance, fixing the lesser rate of only 18.5¢ per MCF or 20¢ per MCF is far below the *existing price level* and is clearly unjust, unfair, and discriminatory to Superior.

6. *Tax Reimbursement.* Above we have shown that the Commission's finding that the base "in-line" initial price of

[9] Staff Memorandum of Position, R. 439.

18.5¢ per MCF is not supportable on this record. The tax reimbursement allowed, where state severance taxes are collected, is, if possible, even less supportable. The allowance is only 1.5¢ per MCF. Recalling that *the only* evidence is that shown in Exhibit X-42, and the related testimony (R. 281-299), it is apparent that the finding of 1.5¢ per MCF is *contrary to the undisputed record,* Schedule 6 of Exhibit X-42 (R. 296), Part II "Other Contracts dated 1957 and 1958", and see R. 281-282. Even for initial base price contracts made in 1957 and 1958 at 18.5¢ per MCF *or less,* the tax reimbursement on a weighted average was 1.69¢ per MCF. For such contracts with prices between 18.6¢ and 21.4¢ per MCF the weighted average reimbursement was 1.85¢ per MCF and for those of 21.5¢ per MCF the weighted average tax reimbursement was 2.01¢ per MCF. Over 56% of all the gas sold under 1957 and 1958 contracts provided for weighted average tax reimbursement ranging from 1.85¢-2.01¢ per MCF. The "in-line" tax reimbursement in contemporaneously certificated contracts with comparable initial base rates is 2.01¢ per MCF. This may seem like a *de minimis* matter. Such is not the case — ½¢ per MCF makes a difference of more than $1,000,000 to The Superior Oil Company alone.

Only by reference to the record in its Opinion No. 351 (R. 560-561) does the Commission even pretend to support its 1.5¢ per MCF tax reimbursement for in-line pricing. This Court's decision in *Catco,* 360 U.S. 378, repudiates use of a foreign record proceeding to support a Commission finding. No amount of expertise or discretion should allow the Commission to find contrary to all of the evidence in the case being decided.

C. Conclusion

In conclusion, it is respectfully submitted that this Honorable Court erred in reversing the Court below, and it is further submitted that it erred even more grievously in affirming the Commission's determination of the applicable in-line price applicable to these proceedings. Rehearing of the Courts decision of December 7, 1965 is prayed.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I, H. W. VARNER, counsel for The Superior Oil Company, hereby certify that the foregoing Petition for Rehearing is presented in good faith, and is not interposed herein for delay.

Service hereof has been made this day by mailing copies to all counsel as provided in Rule 33 of the Court.

Certified at Houston, Texas, this 22nd day of December, 1965.

.....
H. W. Varner

SUPREME COURT OF THE UNITED STATES

Nos. 21, 22, 26 AND 32.—OCTOBER TERM, 1965.

United Gas Improvement Co. et al., Petitioners, 21 v. Callery Properties, Inc., et al. Public Service Commission of the State of New York, Petitioner, 22 v. Callery Properties, Inc., et al. Ocean Drilling & Exploration Company, Petitioner, 26 v. Federal Power Commission et al. Federal Power Commission, Petitioner, 32 v. Callery Properties, Inc., et al.	On Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[December 7, 1965.]

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

The Federal Power Commission in 1959 granted unconditional certificates of public convenience and necessity to numerous producers of gas in south Louisiana, the sales contracts of the producers calling for initial prices ranging from 21.4 cents to 23.8 cents per Mcf. After deliveries commenced under those contracts, consumer interests challenged the orders in various courts of appeals. The Third Circuit Court of Appeals sustained the Com-

mission's action (*United Gas Improvement Co.* v. *Federal Power Comm'n*, 269 F. 2d 865) but we vacated the judgment (*Public Service Comm'n* v. *Federal Power Comm'n*, 361 U. S. 195) for reconsideration in light of *Atlantic Refining Co.* v. *Public Service Comm'n* (CATCO), 360 U. S. 378; and the other courts of appeals did likewise.[1]

The Commission, thereupon, instituted an area rate proceeding for south Louisiana and consolidated the remaining cases with that proceeding. 25 F. P. C. 942. It advised the producers of their potential obligation to refund any amounts eventually found to be inconsistent "with the requirements of the public interest and necessity" under § 7 of the National Gas Act. 27 F. P. C. 15. Later the Commission in interests of expedition severed the present group of applications and set them for a hearing in a consolidated proceeding under § 7. 27 F. P. C. 482. At the end, the Commission imposed two conditions on the certificates granted in these cases. *First*, it provided that the producers commence service at 18.5 cents per Mcf. plus 1.5 cents tax reimbursement where applicable, a price that it found to be "in line" with prices for Commission-certificated sales of gas from the southern Louisiana production area under generally contemporaneous contracts, 30 F. P. C. 283, 283–289. *Second*, it provided that until just and reasonable area rates are determined for south Louisiana, or until July 1, 1967, whichever is earlier, the producers shall not file any increased rates above 23.55 cents, the level at which rate filings might trigger increased rates by other producers under the escalation provisions of their contracts with

[1] See *United Gas Improvement Co.* v. *Federal Power Comm'n*, 283 F. 2d 817; *Public Service Comm'n* v. *Federal Power Comm'n*, 287 F. 2d 146; *United Gas Improvement Co.* v. *Federal Power Comm'n*, 287 F. 2d 159; *United Gas Improvement Co.* v. *Federal Power Comm'n*, 290 F. 2d 133; and *United Gas Improvement Co.* v. *Federal Power Comm'n*, 290 F. 2d. 147.

the pipeline companies here involved. 30 F. P. C. 283, 298.

In addition, the Commission ordered the producers to refund to their customers the amounts in excess of the proper initial price which they had already collected under the original certificate. 30 F. P. C. 283, 290.

On review the Court of Appeals held that the Commission erred in limiting producers to an initial "in-line" price without first canvassing evidence bearing on the question of what would be a just and reasonable price for the gas. It further held that the Commission had no power to place an upper limit on future rates that a producer might file. Finally, the Court of Appeals, while upholding the power of the Commission to order refunds, held that the measure of such refunds was not to be the difference between the "in-line" price and the original contract price, but between the latter and the just and reasonable price subsequently to be fixed. 335 F. 2d 1004. We granted certiorari, 380 U. S. 931. We reverse the Court of Appeals.

We think the Commission acted lawfully and responsibly in line with our decision in the *CATCO* case where we held that it need not permit gas to be sold in the interstate market at the producer's contract price, pending determination of just and reasonable rates under § 5. 360 U. S. 378, 388–391. Rather, we held that there is ample power under § 7 (e),[2] to attach appropriate protective conditions. And see *Federal Power Comm'n* v. *Hunt*, 376 U. S. 515, 524–527. The fixing of an initial "in-line" price fixes a firm price at which a producer may operate, pending determination of a just and reason-

[2] Section 7 (e) provides in part:

"The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require."

able rate, without any contingent obligation to make refunds should a just and reasonable rate turn out to be lower than the "in-line" price. Consumer protection is afforded by keeping the "in-line" price at the level where substantial amounts of gas have been certificated to enter the market under other contemporaneous certificates, no longer subject to judicial review or in any way "suspect." We believe the Commission can properly conclude under § 7 that adequate protection to the public interest requires as an interim measure that gas not enter the interstate market at prices higher than existing levels. To consider in this § 7 proceeding the mass of evidence relevant to the fixing of just and reasonable rates under § 5 might in practical effect render nugatory any effort to fix initial prices.[3] We said in *CATCO* that § 7 procedures are designed "to hold the the line awaiting adjudication of a just and reasonable rate" (360 U. S., at 392), and that "the inordinate delay" in § 5 proceedings (360 U. S., at 391) should not cripple them.

The second condition, which temporarily bars rate increases beyond 23.55 cents per Mcf., was likewise aimed

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[3] In the early post-*CATCO* cases, the Commission apparently proceeded on a case-by-case basis, considering whatever evidence might have been presented. See, *e. g.*, *Continental Oil Co.*, 27 F. P. C. 96, 102–108. Experience convinced it that the minimal utility derived from cost and economic trend evidence was outweighed by the administrative burdens and delays its consideration inevitably produced. See *Skelly Oil Co.*, 28 F. P. C. 401, 410–412. The Commission properly and constructively exercised its discretion in declining to consider this large quantity of evidence. To have done so would have required a considerable expenditure of manpower, cf. *Wisconsin* v. *Federal Power Comm'n*, 373 U. S. 294, 313. We have previously encouraged the Commission to devise reasonable means of streamlining its procedures, see *Federal Power Comm'n* v. *Hunt*, *supra*, at 527, and we regard the Commission's decision here as an appropriate step in that direction. Cf. *Federal Power Comm'n* v. *Texaco, Inc.*, 377 U. S. 33, 44.

at keeping the general price level relatively constant pending determination of the just and reasonable rate. We noted in *Federal Power Comm'n* v. *Hunt, supra,* at 524, that "a triggering of price rises often results from the out-of-line initial pricing of certificated gas" and that the possibility of refund does not afford sufficient protection. And see *Federal Power Comm'n* v. *Texaco, Inc.*, 377 U. S. 33, 42–43. We think, contrary to the Court of Appeals, that there was ample power under § 7 (e) for the Commission to attach these conditions for consumer protection during this interim period though the certificate was not a temporary one, as in *Hunt*, but a permanent one, as in *CATCO* and *Federal Power Comm'n* v. *Texaco, Inc., supra.*

The "in-line" price of 18.5 cents is supported by the contract prices in the south Louisiana area that were not "suspect," and the selection of 23.55 cents beyond which a price increase might trigger escalation reflects the Commission's *expertise.*

We also conclude that the Commission's refund order was allowable. We reject, as did the Court of Appeals below, the suggestion that the Commission lacked authority to order any refund. While the Commission "has no power to make reparation orders," *Federal Power Comm'n* v. *Hope Natural Gas Co.*, 320 U. S. 591, 618, its power to fix rates under § 5 being prospective only, *Atlantic Refining Co.* v. *Public Service Comm'n, supra,* at 389, it is not so restricted where its order, which never became final, has been overturned by a reviewing court. Here the original certificate orders were subject to judicial review; and judicial review at times results in the return of benefits received under the upset administrative order. See *Securities & Exchange Comm'n* v. *Chenery Corp.*, 332 U. S. 194, 200–201. An agency, like a court, can undo what is wrongfully done by virtue of its order. Under these circumstances, the Commission

could properly conclude that the public interest required the producers to make refunds [4] for the period in which they sold their gas at prices exceeding those properly determined to be in the public interest.

We think that the Commission could properly measure the refund by the difference between the rates charged and the "in-line" rates to which the original certificates should have been conditioned. The Court of Appeals would delay the payment of the refund until the "just and reasonable" rate could be determined. We have said elsewhere that it is the duty of the Commission, "where refunds are found due, to direct their payment at the earliest possible moment consistent with due process." *Federal Power Comm'n* v. *Tennessee Gas Transmission Co.*, 371 U. S. 145, 155. These excessive rates have been collected since 1958; under the circumstances, the Commission was not required to delay this refund further. And the imposition of interest on refunds is not an inappropriate means of preventing unjust enrichment. See *Texaco, Inc.* v. *Federal Power Comm'n*, 200 F. 2d 149, 157; *Phillip Carey Mfg. Co.* v. *Labor Board*, 331 F. 2d 720, 729–731.

Reversed.

MR. JUSTICE FORTAS took no part in the consideration or decision of these cases.

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[4] The problem of refunds for amounts collected above the "in-line" price is not affected here by any filing under § 4 for increases within the limits of the triggering moratorium. Under § 4 (d), a 30-day notice to the Commission and to the public is required for all rate increases, the Commission having authority under § 4 (e) to suspend the new rate for five months and thereafter to act only "after full hearings." If the Commission has not acted at the expiration of the period of suspension, the new rates become effective. The Commission may require the producer to furnish a bond, and thereafter may compel refund of "the portion of the increased rates or charges by its decision found not justified."

SUPREME COURT OF THE UNITED STATES

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Federal Power Commission, Petitioner,
32 v.
Callery Properties, Inc., et al.

On Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[December 7, 1965.]

MR. JUSTICE HARLAN, concurring in part and dissenting in part.

While the Commission's expansive view of its powers seems to me largely defensible in the abstract, I believe its actual decision reveals error and unfairness in important respects.

I.

The price condition, alone of the three key prongs of the Commission's order, can in my view be wholly sustained. The chief challenge to it stems from the exclu-

sion in the § 7 hearing of a mass of cost and supply-demand evidence tendered by producers.[1] Although the encompassing § 7 standard of public convenience and necessity encourages a broad inquiry, the Commission has given valid reasons for limiting itself to the in-line price for the time being. Area pricing ultimately aims to simplify proceedings under the statute, but the transition to it is said to strain the Commission's present resources for investigation. See *Wisconsin* v. *FPC*, 373 U. S. 294, 298–300, 313–314. The in-line price, comparatively easy to fix, provides a firm basis for producers, helps avoid unrefundable initial overcharges, and exerts a downward pressure on price; at the same time, producers can file increases under § 4 with a six-month delay at most. The Commission has given a fair trial to cost evidence,[2] and nothing in the offer of proof suggests a supply-demand crisis warranting court intervention with this administrative approach.

In locating the in-line price, the Commission has ignored a number of contemporaneous high-price contracts labeled "suspect" because then under review, disapproved, or deemed influenced by those under review or disapproved. Although the danger of using a crooked measuring rod demands some precaution, this blanket exclusion also chances some distortion in favor of an unduly low in-line price. In the main the producers have chosen not to brief this question, apparently under the misapprehension that the Government has not here sought to sustain the exclusion of these contracts or that the lower court's failure to reach the question precluded this Court from doing so.[3] But while the suspect order rule may by default be abided in this instance, I would

[1] Section citations herein are all to the Natural Gas Act, 52 Stat. 821, as amended, 15 U. S. C. §§ 717–717w (1964 ed.).

[2] See the majority's note 3, *ante*, p. —.

[3] See Petition of the United States for Certiorari, p. 15, n. 14.

not close the door to future arguments for a different solution of the dilemma.

A last troubling aspect of the in-line price derives from a critical and unusual circumstance: it, like the other conditions in this case, was imposed for the first time on remand, several years after an unconditioned permanent certificate had issued. Presumably for six months hence, producers will be compelled to sell at a price they might not have accepted when free to refuse; for all that appears, the price may even be below cost, let alone a fair profit. However, in general the producers apparently did not seek an option to cancel future sales if dissatisfied by the newly conditioned certificates, the six-month delay is both brief and familiar, and I cannot say the Commission did not have a legitimate interest in imposing the in-line price at the time it did.

II.

The price-increase moratorium also seems to me a measure not generally beyond the Commission's grasp, but it should not be sustained on the record before us. Recognizing force in the contrary view of the Court of Appeals, I do not believe that § 4 must be read to bestow on producers an invincible right to raise prices subject only to a six-month delay and refund liability. Cf. *FPC* v. *Texaco, Inc.*, 377 U. S. 33; *FPC* v. *Hunt*, 376 U. S. 515. A freeze until 1967 is not permanent price-fixing, and in this interregnum between individual and area pricing, the hazard of irreversible price increases warrants imposing some brake. A lengthy moratorium—coupled with a refusal to consider cost or supply-demand figures in setting prices for the duration—might present a real risk of choking off supply, but such a case is not before us.

Nevertheless, a moratorium instituted on remand is a hazardous device at best, and the present one is simply not supported by evidence. Because the producers have

no chance to refuse the certificates after commencing delivery, the ceiling may coerce sales at unfairly low prices. Yet while the present moratorium must be endured longer than the in-line price, at least it permits the producers to charge a markedly higher amount; and as the safety valve for a price explosion, the moratorium could be upheld. At this point, however, the Government's argument fails for lack of proof that a price explosion is likely if increases rise above the moratorium figure. The Commission's figure was not considered by its hearing examiner, who made no recommendation for a moratorium. The Commission report itself devotes no more than one conclusory sentence, qualified by a footnote, to the question of what specific price rise will trigger increases at large, 30 F. P. C., at 298; rather than amplifying, the Government brief merely contends that the point has not been adequately preserved under § 19—a contention I do not accept.[4] Several producers state that the Commission's fear of triggering has not been realized although sales are currently being made by them at prices above the intended moratorium.

III.

While agreeing that the Commission has power to order refunds in the case before us, I believe the measure of repayment it selected is illogical and harsh. On the initial question of power, it must be conceded that noth-

[4] This precise ground of attack upon the moratorium was set forth by at least one producer. See ODECO Application for Rehearing Before the FPC. R. 603. Applications of other producers argued instead that any moratorium was plainly illegal under the Fifth Circuit's decision in *Hunt* v. *FPC*, 306 F. 2d 334, which had not then been reversed by this Court. 376 U. S. 515. See Petition of Placid Oil, et al. for Rehearing Before the FPC, p. 35. Under these circumstances, § 19 does not seem to me to preclude allowing all producers the benefit of the error pinpointed by ODECO.

ing in the statute provides for refunds when a sale has been approved without qualification; but approval in the present instances had not become final for want of judicial review, and an equitable power to order refunds may fairly be implied.

The measure of refunds is another matter. The Commission has now directed that the producers repay the difference between the amounts collected over four to six years and the figure it has now established as the original in-line price.[5] Since the in-line price has been fixed without reference to cost evidence and falls below the opening levels set in the negotiated contracts, the producers may well be receiving less than cost, as some of them expressly claim; and this imposed revision downward of prices covers not six months but a period of years.

The obvious refund formula, implicated by the statute itself and adopted by the Court of Appeals, would call for repayment of all amounts collected in excess of the "just and reasonable" price; that price, measured under §§ 4 and 5, naturally takes due account of costs. The Government retorts that producers have no "right" to sell their gas for a "just and reasonable" price under the statute, a proposition perhaps true in the limited sense that the public convenience and necessity might yet exclude fair-profit sales by a uniquely high cost producer or in the face of a glutted market. No attempt is made, however, to class the present facts with such imaginable situations. Nor is advance exclusion from the interstate

[5] Deliveries commenced under all or nearly all the contracts in 1959 at prices exceeding 18.5 cents. The Commission's order directing the in-line price, refunds, and the moratorium issued four years later in 1963, and it has been under judicial review for the past two years. The record does not clearly indicate what rate increases the producers may already have filed with the Commission.

market so fearsome as an unexpected repricing of a completed sale depriving the seller of profit or costs.

On the present facts the Government has failed to point to any public interest overriding the potent claims of the producers to a fair return on their past four to six years of sales. Any triggering caused by the amounts previously charged has already spent its force and cannot be undone. Unconvincingly, the Government implies the producers may be comparatively well off with the present formula because it provides a final figure now and the "just and reasonable" price might prove to be below the in-line price; however, instant certainty as to past prices is no great gain since taxes and royalties have already been paid, and the chance that producers may get more than they deserve by following the in-line price is not a substitute for assuring them a fair return. About the only concrete advantage cited by the Government for the in-line price is that it speeds refunds to consumers. Assuming that a compromise cannot be reached as in other cases,[6] elaborate cost data should become available in the next year or two with the completion of the Southern Louisiana area rate proceeding. Consumers, who assuredly expected no refunds when they paid their gas bills as long ago as six years, certainly do not suffer seriously in waiting a bit longer for refunds that individually must be minute in most cases.

The incongruity of the Commission's refund formula is well portrayed by considering what would have happened if the Commission had originally granted the certificates now thought proper by this Court. By accepting certificates conditioning sales at the in-line price, the producers

[6] On several occasions, the Commission has approved agreements by producers to refund a fixed fraction of the difference between the amounts collected and the settlement price. See *Texaco Inc.*, 28 F. P. C. 247 (other producers severed from the instant case); *Continental Oil Co.*, 28 F. P. C. 1090 (on remand from *CATCO*).

could immediately have filed for increases, suffering at most a six-month delay. Even if the Commission's moratorium survived, the ceiling during this four-to-six-year period would have been 23.55 cents rather than the 18.5 cent figure now imposed. Thus, even had the Commission not erred in the first instance in favor of the producers, they still could have collected payments well in excess of 18.5 cents subject only to the ultimate finding of a "just and reasonable" price now denied them by the Commission.

In line with the foregoing discussion, I would uphold the Commission's decision fixing an in-line price, remand the case for further findings on the triggering price for a moratorium if the Commission wishes to pursue the point, and set aside the refund with leave to order repayments based on the "just and reasonable" price.